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DUE PROCESS IN MATTERS OF CLEARANCE DENIAL AND REVOCATION: A REVIEW OF THE CASE LAW BY JOHN NORTON MOORE, ESQ., RONALD L. PLESSER, ESQ., AND EMILIO JAKSETIC, ESQ.

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Defense Personnel Security Research
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The legal implications of the denial or revocation of security clearances are complex and controversial issues. Even knowledgeable constitutional scholars are not in full agreement over the minimal requirements of due process in clearance denials. This report presents three distinct analyses of the subject by three well-qualified attorneys. The similarities and differences in legal reasoning and their subsequent conclusions illuminate the central questions of due process and should inform the development of appropriate policy. Recent court decisions have been reproduced as appendices to provide a comprehensive reference.

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Preface

Due process is a guarantee that extends to citizens with or without security clearances. When the state, through administrative action, attempts to deny or revoke a security clearance, certain due process rights are called into play. While current procedures and practices appear to meet constitutional requirements, new requirements embodied in Executive Order language may be seen as degrading due process protection. In order to better understand the issue of due process and its implications for security and policy professionals, the following report was commissioned. It is valuable to lawyer and layman alike. An understanding of the impact of due process is fundamental to any system of granting and denying clearances.

Carson K. Eoyang
Director

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Summary

Background and Issue

Any procedural change perceived to alter Constitutional due process requirements (such as a change in the Executive Order governing personnel security) in adverse actions, e.g., in areas where security clearances are denied or revoked, will be closely examined by the courts. Three distinct categories of personnel may be affected by the change and their special needs must be considered.

Objective

Provide scholarly legal analysis and a review of case law for the policy maker concerning the implications of due process requirements in adverse clearance actions. Allow the policy maker to then view the proposed revisions to Executive Order 10450 against this analysis.

Approach

Two independent, well-qualified lawyers provided structured legal analysis of the due process issue for DoD. A Hearing Examiner with the Directorate for Industrial Security Clearance Review conducted inquiries into the issue. In addition, an Air Force security specialist provided an analysis focused on the DoD regulatory requirement for military commanders to provide due process prior to reassigning military members for security reasons. The editors reviewed, contrasted and summarized these legal analyses, adding additional data on adverse clearance actions.

Results/Conclusions

Legal scholars warn that any perceived degradation in the amount of due process afforded individuals may not pass muster in the eyes of the courts. Moreover, any uniform procedure must assume that a denial or revocation of a security clearance will always implicate property and liberty interests. Suggestions for modifications to existing regulations are offered as well. Based on the four analyses, current procedures satisfy minimum due process requirements. Varying implementation of procedures may cause legal challenges. Of primary concern is the differentiation between civilian, military and contractor personnel in terms of due process rights. To afford government civilians the same rights now held by contractors will require additional personnel resources. New procedures, such as expanded polygraph use and drug testing, may also alter the perception of the courts in due process cases.

Acknowledgements

In a society which prides itself on safeguarding the rights of the individual, questions of providing constitutional guarantees of specified freedoms are certain to be the focus of attention, wherever they arise. Such issues are daily considerations in the security policy arena throughout DOD. Always seeking the optimum balance between the rights of the individual and the needs of national security, Defense posed the initial questions which led to this research effort.

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Foreword

As The Department of Defense grappled with the revision of Executive Order 10450, it was apparent that there were constitutional and legal issues regarding due process not clearly understood by those responsible for initiating policy recommendations, nor had they been comprehensively researched. In mid 1987, the Defense Personnel Security Research & Education Center was asked to examine the relevant issues.

The nature of the task required legal expertise in fairly specific areas, so the first management task was to locate and engage individuals who could authoritatively address the research questions posed. In search of credible objectivity, Defense also asked that the research be accomplished by non-DOD legal experts, at least two, from different legal perspectives. The primary qualifying criterion was experience in both due process litigation and constitutional law dealing with liberty and property rights. Mr. John Norton Moore and Mr. Ronald Plesser were approached and enthusiastically accepted the challenge offered. Both have extensive background in the preferred areas and represent somewhat different perspectives on the law. Mr. Emilio Jaksetic was selected by the editors to provide a perspective from a DOD representative actively engaged in the issues addressed. His report, written well before the beginning of this study, was originally intended as an information memorandum for his office, the Directorate for Industrial Security Clearance Review, and its inclusion allows the reader the opportunity for a more completely balanced comparison of viewpoints. A detailed analysis of the due process rights of military personnel prepared for the DoD by Gregory P. Chavez, an Air Force personnel security intern, is also presented as an appendix. Biographical notes for the principal contributors are included in the appendix and in the chapters of the report devoted to their respective analyses.

The two non-DOD legal experts were asked to address several of the most relevant questions (for DOD policy-makers) associated with due process for security clearance denial/revocation. They were also asked to provide commentary on the analysis reported by each other, in order to explore more deeply any differences in conclusions.

The organization of this report is intended to facilitate understanding of the origins of the issues discussed and the conclusions reached. We begin by briefly citing the many faceted questions which arose in initial discussions about how to structure the effort. The questions given to the primary researchers were synthesized from those discussions. They are intended to provide in their analysis the most significant bases for possible policy changes.

Next, the legal context is established by a brief outline of the history of, and constitutional foundations for, due process consideration. The most significant case

pertaining to a clearance revocation, Greene v. McElroy is examined, as is the most recent case which clarifies certain due process issues and involves a denial of clearance, Department of the Navy v. Thomas Egan and Hill v. Department of the Air Force. While the Greene and Egan cases are cited in the three legal analyses, no decision had, at the time, been reached in the Egan case or Hill case. This brief introduction should make it easier to understand the legal perspectives from the vantage point of mid-1988.

Since one of the principal questions to be addressed concerned the adequacy of existing DOD policies regarding due process, we next provide a summary of those policies. Current due process procedures for military personnel, DOD civilians and civilian contractor employees are examined. Differences associated with special access programs are also explored. Some additional perspective is given by reviewing current and potential adverse action caseloads, along with resource requirements.

This background information is followed by offering in its entirety each of the written analyses submitted by Messrs. Moore, Plesser and Jaksetic. Reading and re-reading these chapters for comparison is strongly encouraged.

The final section of the report attempts to integrate the findings of the three analyses by comparing and summarizing them within the framework of the research questions posed. We close by offering certain conclusions of the editors, which both support and expand upon those given by the legal analysts.

Chapter 1

Introduction and Background

Relevant Questions

The following questions, among others, have surfaced recently in the context of examining personnel security issues and due process. This report examines the following issues:

1. What are the rights of the individual under the U.S. Constitution in matters involving denial or revocation of security clearances?

2. What are the existing policies and procedures within DOD which constitute "due process" for those whose clearances have been adversely adjudicated?

3. Is every individual so affected due the right to personally confront witnesses against him/her in a "courtroom" environment?

4. Under what circumstance, if any, does a security clearance acquire the characteristics of a property or liberty right?

5. When the rights of the individual and those of the government seem to collide, what are the criteria for deciding dominance?

6. When administrative procedures designed to protect the rights of the government and of the individual are played out in different jurisdictions, and their findings are in conflict, how are they to be resolved?

There are several due process procedural requirements, as defined by DoD, supporting service agency regulations and those of other governmental agencies, which differ in certain significant and fundamental ways. Whether differences are warranted by special circumstances or if they need to be narrowed, requires consideration. The impact of expanding or liberalizing the scope of due process also needs examination. Further, but of longer range consideration, is the question of the consequences accruing to those whose clearances have been denied or revoked.

Additional, and perhaps more fundamental, issues remain. For example, to what extent is the "harm" to the individual wrought by denial or revocation of an individual's clearance, balanced by the added national security which results from such action? How is the behavior which gave rise to the adverse action connected to potential

security risk? These questions form some basis for the legal opinions expressed in the existing body of case law.

This report attempts to resolve certain of these questions, recommend approaches for considering others, and bring clarity to the general area of due process as it relates to DOD security clearances.

To better understand the legal relationship between an individual and the state it is necessary to understand the concept of due process of law. This issue is readily apparent when the government attempts to deny or revoke a security clearance. The courts have interpreted due process in numerous decisions over the years. Since World War II a more complete definition of the meaning of clearance eligibility, of the property and liberty rights contained in the clearance, and the force of regulations in place to administer adverse actions involving a security clearance has emerged.

A security clearance is the temporary granting of permission to an individual by the Executive branch to have access to sensitive information.

> The Executive Branch has constitutional responsibility to classify and control access to information bearing on national security. A security clearance is merely temporary permission by the Executive for access to national secrets. It flows from a discretionary exercise of judgment by the Executive as to the suitability of the recipient for such access, consistent with the interests of national security (Hill v. Department of the Air Force, 344 F. 2d 1407 at 1411).

This paper attempts to place due process issues in the context of such adverse security clearance determinations.

A History of Due Process

The procedural protection for certain rights of free men in conflict with the state is a time-honored tenet of English common law. The phrase used in the Bill of Rights, "due process of law," is taken from a paraphrase of the 1225 version of the Magna Carta, which reads:

> No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, not put to death, without he be brought to answer by due process of law (Senate, 1964).

Thus, under common law, due process recognized that the King (state) and individuals within the state were apt to be in conflict. To restrict the power of the state and allow

for procedural protection, the concept of individual rights of due process was developed and codified.

There are two types of due process, procedural and substantive. Both have applicability in cases where the government is attempting to deny or revoke a security clearance.

Procedural due process concerns the rights of an individual when accused in an administrative, criminal or military proceeding. While many of the substantive due process cases heard by the Supreme Court have dealt with criminal matters, a portion have also dealt with administrative procedures. On the whole, the importance of procedural due process is:

> to guard the privacy and other social rights of every individual, as much as to prevent compulsory self-incrimination, that search warrants are required and the indiscriminate seizure of private papers is forbidden. Such rights and immunities are expressed in the maxim that "Every man is considered innocent until proven guilty" (Senate, 1964).

The fourth, fifth, sixth and eighth amendments cover specific procedural due process protection, such as the right to a trial by jury, against self-incrimination and so on. In the fifth amendment specific due process language is that:

> No person shall be...deprived of life, liberty, or property without due process of law.

In security clearance denial or revocation, procedural due process involves the government's adverse action procedures that may result in the denial or revocation of a security clearance. In general, due process has come to mean that denial or revocation will not occur until the individual being investigated is given a fair hearing. The due process burden of proof rests with the government.

Substantive due process rights are enumerated in the first, fifth, and fourteenth amendment to the Constitution. Passed in the mid-19th century, the fourteenth amendment binds each state to the same standard in observing due process that the federal government was held to under the 18th century first amendment. The fourteenth amendment also restates the language in the fifth amendment that persons shall not be deprived of life, liberty, or property without due process of law (Brant, 1965).

These amendments recognize that most legislation and administrative procedure will cause discrimination among persons, based on required prohibitions and sanctions in the law or regulation. The fairness doctrine applies: In cases involving adverse

security clearance actions the courts have stated that substantive due process rights must not be taken away by any arbitrary, discriminatory, or capricious system.

Liberty and Property Interests

The liberty interests mentioned in the fifth and fourteenth amendments are fundamental freedoms granted by the constitution. These interests involve, at a minimum, the right to conduct business, marry, establish a home, worship and be free from bodily harm (Brant, 1965). Any time denial actions in security determinations are seen as stigmatizing, that is, having the effect of preventing further employment, they involve liberty interests.

Property interests are those derived from administrative action, state law, or other regulation, either written or implied. They are man-made as opposed to the inalienable rights of liberty. Property rights in adverse clearance actions are examined in the context of the individual having the clearance, the contract between the person and the government or private contractor, and any other situational variable deemed relevant.

Two cases three decades apart illustrate how due process issues involving adverse security clearance determinations have been handled. The first is a case decided in the late 1950s which caused immediate release of a new Executive Order for industrial contractors. The second is a 1988 decision involving a denial of clearance for a government employee and the administrative remedy taken.

The **Greene** Case

The 1959 case of Greene versus McElroy places the issue of due process in clearance denials and revocations in clearer focus. While the Supreme Court sidestepped certain issues, such as liberty and property rights inherent in a security clearance, it listed "certain principles (that) have remained relatively immutable in our jurisprudence." The specific principle in question was that of allowing individuals due process rights of review of evidence and confrontation of accusers.

Mr. Greene had been employed for over 15 years by a major defense contractor when he was accused of associating with Communists. Since his trustworthiness was called into question by that allegation (made by confidential informants) a hearing was required to determine whether he should retain his clearance. Before a four-member board, Mr. Greene refuted the charges, bringing character witnesses forward to testify. The board chose to revoke Greene's clearance based on the evidence of the confidential informants. Under loyalty procedures then in effect, Mr. Greene was not given the chance to confront these sources or cross-examine them. He was fired and without a

clearance could find no other employment in the aerospace industry. He filed suit, claiming the government had denied his liberty and property rights without due process.

The U.S. Supreme Court heard the case and decided for Mr. Greene. The constitutional issue of what liberty or property interests an individual has in holding a security clearance were not addressed. Rather, the Court expressed its strong opinion that, in any administrative procedure, the Government must afford an individual the opportunity to review evidence and confront witnesses.

> Where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue (Greene v. McElroy, 360 U.S. 496).

The Greene case is, as Mr. Jaksetic remarks in Chapter 4 of this paper, one containing "talismanic language which must be addressed in any subsequent case" involving adverse clearance actions.

The **Egan** Case

A more recent case highlights the court opinion that revocation of a clearance does not indicate the government has passed negatively on the judgment of an individual. This is the case of Department of the Navy versus Thomas E. Egan. Unlike the Greene case mentioned above, Egan deals with the procedural aspects of appeal in clearance denial actions and the location of the final appeal authority in such hearings.

Thomas Egan had been employed as a laborer at a naval refit facility in Washington state. He had signed papers indicating that he would only be retained in his position if he could pass clearance and medical screening. When Egan's case was reviewed, his request for clearance was denied based on criminal records and self-admitted alcohol problems. Without a clearance Mr. Egan could not retain his position or any other at the refit facility and he was removed after an administrative review of his denial by a personnel security board. Mr. Egan claimed he had paid his debt to society and brought forth witnesses to attest to his character.

At that point Mr. Egan chose to have his case reviewed under what are called 7513 procedures. The United States Code contains a chapter entitled "Adverse Actions." This portion of the code allows protection for civilian government employees being dismissed for other than national security reasons by granting them additional due process. The rights include representation by counsel and a written decision. The

Board under which these appeal can be heard is the Merit Systems Protection Board (MSPB).

The Government argued that removal had occurred for security reasons and thus fell more properly fell under paragraph 7532 procedures of the code which state "the head of an agency...(may suspend an employee) when he considers the action necessary in the interests of national security." The 7532 procedures provide no appeal to the MSPB.

An appeals court held that 7532 procedures were not the only remedy for an appeal of dismissal on national security grounds. In that finding it upheld Mr. Egan's contention that his dismissal could be appealed to the MSPB under the provisions of 7513. In making its final decision the Supreme Court held that the "two statutes stand separately and provide alternative routes for administrative action."

The Supreme Court decided that denial under 7532 procedures was sufficient to give Mr. Egan due process. Moreover, the court affirmed the following tenets:

- That there is no inherent right to a security clearance,
- The Executive Department has discretionary rights to grant access to classified information,
- An adverse clearance determination does not pass judgment on an individual's background,
- The Merit Systems Protection Board does not have expertise to hear security clearance appeals (US Supreme Court 86-1552).

The **Hill** Case

A second 1988 case decided less than two months after Egan dealt with similar issues and reaffirmed much of Egan. The Hill case went further in stating that there is no liberty or property interest in possession of a security clearance. The case involved a civilian employee of the Department of the Air Force whose clearance had been revoked after he was accused of, among other things, misuse of telephones, and found to be no longer worthy of a security clearance.

Mr. Hill argued that his clearance should be reinstated since the Air Force revocation action violated his due process rights and deprived him of liberty and property. A district court agreed with Mr Hill, stating that the Air Force action was illegal. On appeal, the United States Court of Appeals, Tenth Circuit, found that in fact

the Air Force was correct and reversed the lower court opinion. In announcing its decision the Appeals Court said:

> We hold that Hill did not have a constitutional property or liberty interest in his security clearance. The same reasoning which underpins Egan supports that conclusion (Hill v. Department of the Air Force, 344 F. 2d 1047).

With this brief background and a review of relevant court findings, this paper will address the issues of due process in adverse clearance actions. Since the courts have been reluctant to address specific issues regarding liberty and property interests in possession of a clearance, it is necessary to outline the current adverse action procedures used in the Department of Defense for military, civilian and contractor employees and assess whether they would meet minimum due process standards as the Courts have viewed them.

Current DoD Due Process Requirements and Procedures

Military Personnel. DOD Directive 5200.2-R, Chapter VIII, outlines the requirements and procedures to be followed by the Army, Navy, Air Force and Marine Corps in the case of unfavorable administrative actions resulting from an adverse personnel security determination. Briefly summarized, these procedures permit no unfavorable administrative action unless the person has been given:

1. A written statement of the reasons for the unfavorable action, i.e., Statement Of Reasons (SOR);

2. An opportunity to respond in writing to the specified authority;

3. A written response from the specified authority to the individual submitting the reclama; and

4. An opportunity to appeal to a higher level of authority as specified.

This procedure is administrative in nature. It does not specify or imply that administrative or judicial hearings are included, or provide for the opportunity personally to confront witnesses. Only the requirement to submit written evidence in the matter being adjudicated is mentioned. The procedures outlined by DoD Directive 5200.2-R are currently followed by the services for cases involving denial or revocation of security clearances. Minor differences appear with the internal procedures for developing the written response of the applicant's reclama to the original SOR. Another difference concerns the delegation of authority for appeal decisions. For instance, in the Air Force appeals are decided by the Administrative Assistant to the Secretary of the Air Force

while in the Navy such decisions are made in the office of the Vice Chief Of Naval Operations. Army regulations call for appeals to be decided by the Assistant Chief of Staff for Intelligence (ACSI). These differences reflect the internal organization of the services and are not detrimental to the quality of the due process consideration afforded individual members. For additional information on the due process rights of miliary personnel, see the work of Gregory P. Chavez, included as an appendix to this report.

Appendix A contains details of the adjudication process for DOD civilian and military personnel. The Army has a separate process for Department of the Army civilian employees where circumstances of clearance denial/revocation involve national security. Appendix B describes the procedures for processing these cases for Department of the Army civilian employees and points out additional rights of due process. These procedures very closely approach those followed by the DoD for civilian employees of contractors to Defense agencies. It is estimated that the Army handles 400 civilian and over 2,000 military responses to denial or revocation each year.

Military personnel have not been the subject of case law where due process implications of adverse clearance action is involved. This may be due in part to the individual's lack of legal recourse against the military in clearance denial actions. (The courts have ruled that there is no inherent right to military service or a military career. See, for example, Maier v. Orr, 754 F.2d 973 (1985) and Lindenau v. Alexander, 663 F.2d 68, 1981.) The higher standard by which military personnel are measured and the degree to which possession of a clearance affects an individual's ability to serve in the military are also important. The requirements governing termination of military service are such that, even if an individual is given an honorable discharge, he or she may be removed at any time, without legal recourse.

Military personnel have been given specialized training and education for positions that require a security clearance. To deny them a clearance does impact on their career and ability to obtain like employment elsewhere in the military or outside government. For further discussion of this issue, please see the paper written by Gregory P. Chavez, included as Appendix E of this report.

DoD Civilian Employees. Under somewhat different circumstances, civilian employees of the Department of Defense are protected by certain provisions of laws and regulations. Those in the competitive service fall under protection of the Civil Service Reform Act (CSRA) of 1978. The act provides for two fundamental means of terminating an employee: to promote the "efficiency of the service" or "in the interests of national security." As the Egan and Hill case demonstrated in the national security arena, final authority rests with the agency head. Termination "in the interests of national security" would include proving a rational nexus between specified behavior and degraded national security, supported by substantial evidence.

Civilians in excepted service or in probationary status do not meet the requirements of the CSRA. For personnel in the excepted category, the major intelligence agencies provide for clearance revocation without further involvement of the CSRA. Loss of clearance precludes further employment with the agency. Probationary employees have very limited protection under the CSRA and may be dismissed for cause. Thus, due process is not a stringent limitation.

Industrial Contractor Civilians. Civilian contractor employees of defense-related private sector organizations are in a unique category in that the contract between the employer and employee may affect the legally defined "interest" of the employee with regard to security clearance. Overall, however, the minimum requirements for contractors appear to be the same as those for Defense Department civilian employees. The process which governs civilian contractor personnel associated with DoD and many other federal agencies is outlined in DoD Directive 5220.6. This directive expands upon the policy contained in 5200.2-R in several ways.

In the industrial security arena the Defense Investigative Service (DIS) conducts the initial clearance investigation and forwards the results to Defense Industrial Security Clearance Office (DISCO) for adjudication. Should DISCO determine cause for an adverse finding leading to denial or revocation, the case is referred to the Directorate for Industrial Security Clearance Review (DISCR).

DISCR is responsible for issuing a Statement of Reasons (SOR) to the applicant, and for taking interim actions to obtain the information necessary for deciding the final outcome. After a SOR has been issued, due process procedures are similar to those followed by the services but with some important differences. The applicant may request a hearing, and/or may respond in writing to the SOR. An applicant who desires a hearing must first provide a detailed written response to the SOR. Should the applicant file a written response but not request a hearing, the case will be reviewed by an examiner who considers all pertinent materials and issues a determination.

An applicant who requests a hearing may appear in person with or without counsel or a personal representative. This hearing resembles a full judicial proceeding with presentation of evidence and cross-examination of witnesses (this may also be in writing). Federal rules of evidence are used only as a guide and are not allowed to prevent development of a full and complete case record. The applicant receives a hearing transcript and will be given a written determination by the examiner within 30 days of the close of the hearing.

Either the applicant or department counsel may serve written notice within 20 days of the intent to appeal the hearing examiner's determination. A written appeal must then be filled within 60 days. Such appeals are referred to an Appeals Board which considers the points made in the appeal and may rule on matters of law to

ensure that the actions of the Hearing Examiner were not arbitrary or capricious. No new evidence or testimony is considered.

According to the director of DISCR, Mr. James Brown, of those cases which result in a SOR, 15 percent fail to respond to the letter and 20 to 30 percent request no hearing. For 1986, DISCR handled 427 cases through the hearing process. Approximately half were decided in favor of the applicant. Fifty-two were carried beyond the hearing stage, to the appeals board. Only two of these cases resulted in a favorable decision for the applicant. The adjudication process as applied to civilian contractor personnel is depicted in Appendix C.

In the case where a clearance was suspended, revoked or denied, and such decision is reversed after DISCR action, the applicant may petition for reimbursement of lost earnings resulting from the suspension, revocation or denial.

Cases Involving Access to Sensitive Compartmented Information. All persons (except elected U.S. Government (USG) officials, federal judges and others specified by the Director, Central Intelligence (DCI)) seeking or holding authorization for access to Sensitive Compartmented Information (SCI) are governed by Director of Central Intelligence Directive (DCID) Number 1/14. Each intelligence entity, e.g., DoD, is responsible for specifying organizational responsibilities and structure for compliance with DCID 1/14. The current April 1986 edition of this directive offers a variation on the four-step due process procedure described by DoD Directive 5200.2R. DCID 1/14 provides for: (a) notification of the denial or revocation of SCI access; (b) notification that the individual may request to be provided the reasons for the adverse action; (c) an opportunity to appeal.

The SCI appeal process operates at two levels. In the first instance of appeal, all reclamas by the individual are reviewed by the "Determination Authority" which is that office designated within each agency for adjudication of SCI applications. The decision of the Determination Authority is then communicated to the individual, who may elect to pursue the matter to the second level. Responsibility for the appeal decision resides with the head of that organization or department concerned, or appropriate designee. This decision is considered final and unreviewable.

Issues specifically addressed in DCID 1/14 are property and liberty rights, two issues central to the question of the constitutionality of existing due process procedures. That section reads as follows:

> ...In addition, the provisions of DCID 1/14, this annex, or any other document or provision of law shall not be construed to create a property interest of any kind in the access of any person to SCI. Further, since the denial or revocation of access to SCI cannot by the terms of DCID 1/14

> render a person ineligible for access to other classified information solely for that reason, the denial or revocation of SCI access pursuant to the provisions of DCID 1/14 and this annex shall not be construed to create a liberty interest of any kind.

The following chapter of this report reviews the property and liberty rights question in some detail.

Cases Involving Special Access Other Than Sensitive Compartmented Information. Those programs created pursuant to Executive Order 12356 as "Special Access Programs" or SAPs, deserve special attention, since the degree of access required may or may not be SCI. The Order, implemented in DoD by Directive 5200.1-R, "Information Security Policy Regulation" defines these programs as "Any program imposing need-to-know or access controls...."

A report of the Defense Investigative Service (DIS) of the Special Access Program Review Panel, 31 August 1987, identified the issue of due process for SAPs as follows:

> Security standards for special access programs should address the supplemental personnel screening process for determining access to certain programs. If permitted, they should include the "due process" provisions contained in DoD Directives 5220.6.

After this recommendation was made, the General Counsel, DoD, was asked to determine if "access" determinations and denials require the same due process procedures as do clearance decisions. That determination has not yet been made.

It is clear that the pivotal issue is the definition of clearance and access. While the courts over the past thirty years have tended to mix the two freely, there are substantial differences. Access follows clearance and is based on need-to-know. As shown in the legal analysis of John Norton Moore, court precedents suggest that when the government demonstrates the need for more restrictive access, and there is no stigma attached to not being granted such access, the less due process required. Additionally, recent cases demonstrate the court's unwillingness to challenge special access, granting, or denying access or a clearance except on strict procedural grounds.

Current Due Process Requirements. Due Process requirements are presented in Table 1 which demonstrates both actual and potential requirements if changes are made to DoD procedures. These numbers reveal the potential demand on resources in Defense Department should due process procedures be given broader definition or scope. The figures for the Defense Industrial Security Program (DISP) represent the annual caseload for that organization, for which resources are already allocated.

Remaining DoD organizations do not have resources for due process procedures beyond those already in place.

TABLE 1

DoD Adverse Clearance Actions
(Military and Civilians)

	Denials and Revocations			
Agency	Collateral Clearances		SCI Clearances	
	1984	1986[3]	1984	1986
ARMY	5401	3676	1743	1121
NAVY	425	779	441	209
USAF	298	479	708	264
NSA	NA[2]	NA	1487	1313
DIA	NA	NA	65	96
DISP[1]	194	223	NA	NA
TOTAL	6398	5237	4444	3003

Source: Deputy Under Secretary of Defense (Policy)

[1]Defense Industrial Security Program

[2]Not applicable/ available

[3]Reports for 1985 are not available due to the change in reporting requirements brought about by the clearance reduction program for that year.

It should be noted that if procedures currently in effect in DISCR were applied to the total cleared population of civilian employees of the Department of Defense, an additional 200 to 250 appeals might be made each year. Given the cost of processing such appeals within DISCR, where one hearing examiner (GS-15) is involved in 100 cases per year it is not unreasonable to assume that the DoD would need to hire additional personnel. Following the DISCR formula of one hearing examiner and two GS-14 trial attorneys per 100 cases, an additional six personnel, at an average cost of 44,000 per

individual would be required. Factoring in the cost of contract court reporters and travel, the total additional cost to DoD would approach $400,000 annually.

Time and salary lost for civilian and contractor employees undergoing such appeal is not included in the above calculations. While miliary personnel have the right under the Universal Code of Military Justice (UCMJ) to seek Judge Advocate General (JAG) advice, the most common representation in clearance denial cases would be with civilian attorneys. Nonetheless, military personnel also lose time and salary in this appeal process.

Current Resources Assigned

Within the services, the personnel resources assigned to the "adverse action" process are those already resident at the adjudication activity: the Army Central Clearance Facility at Ft. Meade, Maryland; the Air Force Clearance Adjudication Office in the Pentagon; and the Navy Central Adjudication Facility in Silver Spring, Maryland. Demands placed on these organizations for handling appeals arising from denial or revocation are "taken out of hide" as additional duties for regularly assigned personnel.

The Directorate for Industrial Security Clearance Review (DISCR) is the only organization with resources explicitly allocated to due process issues under conditions of appeal. The full time task of DISCR is to process "issue cases" involving civilian contractor personnel and certain other categories of government sector employee. This includes initial case review and, where appropriate, issuance of a SOR, conducting hearings and providing a Board of Appeals review of the case.

Table 2 lists existing DISCR billets (not all of which are filled), and their estimated annual cost based upon mid-grade salary figures. Actual costs will vary, dependent upon level of billet fill, actual "step" salary levels and other administrative variances. Salary data for military billets are omitted.

TABLE 2
DISCR Billets Authorized

Number of Billets	Grade	Mid-Salary	Total $
5	Military	N/A	N/A
12	GS-15	$ 61,000	$ 732,000
11	GS-14	51,860	570,460
9	GS-13	43,890	395,010
8	GS-12	36,900	295,200
16	GS-11	30,790	492,640
1	GS-9	25,450	25,450
1	GS-7	20,800	20,800
4	GS-6	18,720	74,880
5	GS-5	16,790	83,950
8	GS-4	15,010	120,080
2	GS-3	13,370	26,740
3	Attorney Trainees (est.)	30,000	90,000
85			$ 2,927,210

Source: DISCR

This table represents a moderate case scenario for staff salary costs. The Director of DISCR reports that additional costs for various government withholding, travel and per diem, staff training and equipment and administrative support are predicted to be approximately 10 percent of salaries or, $300,000 annually. The actual current annual budget for DISCR is $2.2 million.

Chapter 2

Legal Analysis by Mr. John Norton Moore

AN INVESTIGATION OF CASE LAW PERTAINING TO DUE PROCESS FOR DOD PERSONNEL WITH DENIED, REVOKED, OR SUSPENDED SECURITY CLEARANCES

by

John Norton Moore
David Martin
Samuel Pyeatt Menefee

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CONTENTS

1.0 Introduction

The Statement of Work for this study notes as background:

> A new draft executive order is being prepared which addresses a variety of issues in the area of personnel security. One such area concerns due process procedures for both civilian contractor personnel and DOD employees/military personnel.
>
> Currently, DOD Directive 5220.6 grants more comprehensive due process procedures to civilian contractor employees than does DOD Regulation 5200-2-R, which applies to DOD personnel. At issue is whether these two distinct approaches to due process should continue, or if there should be a uniform policy for civilian DOD employees, military personnel and contractor employees.

To begin with, something should be said about these two separate approaches, and the reason for their existence. DOD Directive 5220.6 was promulgated on the authority of Executive Order 10,865, 25 *Fed. Reg.* 1583 (Feb. 24, 1960), entitled Safeguarding Classified Information With Industry. This order by President Eisenhower was due to the Supreme Court's decision in *Greene v. McElroy*, 360 U.S. 474 (1959) which held that the Department of Defense, for due process reasons, could not deny a security clearance to a aeronautical engineer employed by a DOD contractor in the absence

of explicit authorization from the President or Congress. *See, Clifford v. Shoultz*, 413 F. 2d 868 at 870-71 (9th Cir. 1969). The resulting Executive Order and Directive, therefore, show a natural inclination to defer to due process considerations. Regulation 5200-2-R, on the other hand derives its authority "from the president's inherent power as commander-in-chief of the armed forces," MARTIN, SCREENING FEDERAL EMPLOYEES: A NEGLECTED SECURITY PRIORITY 51 (1983). Since such strong Constitutional ties have deflected all but the most major due process complaints, *see, Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), it is understandable that less deference to these matters would appear in the existing regulations. Additionally, the procedures derive from two seperate directives. According to the statement of Bill W. Thurman:

> . . . DOD uses different procedures to grant secret clearances to government and contractor personnel. A favorable NACI is required for government personnel, but only a favorable NAC is required for industry employees.
>
> A DOD official explained the rationale for this inconsistency as follows. Executive Order 10450, which governs only federal employees, requires the NACI. Executive Order 10865, issued February 20, 1960, which pertains to safeguarding classified information in industry, does not require the NACI.

Statement of Bill W. Thurman, before the Permanent Sub-committee on Investigations of the Senate Committee on Governmental Affairs, at [5] (Apr. 16, 1985) (on Improvements Needed in the Government's

Personnel Security Clearance Program) [hereinafter Statement of Thurman].

This study will approach the issues in question first, by considering constitutional issues raised in cases concerning DOD security clearances; second, by examining current major issues which may impact on DOD security clearances in the future; and third, by asking four questions posed in the Statement of Work. It is based not only on case law, but on an examination of pending legislation and on extensive conversations with the office of legal counsel in the Pentagon. In considering due process and security clearances it is essential to keep in mind that concern should cut both ways. First, it is necessary to ensure the best and most complete due process to employees of the DOD and its contractors. At the same time it is important to ensure adequate protection of America's national security interests. While a tension is often seen to exist between individual and governmental rights, in fact the two, if properly treated, should be seen as complementary.

2.0 Constitutional Issues

Due Process claims under the Fifth Amendment pose obvious constitutional questions. These, however, may be linked with other issues derived from the First and Fourteenth Amendments. Because of the interrelated nature of these challenges, we have attempted to examine all major constitutional issues raised in cases challenging DOD security clearance procedures.

2.1 First Amendment Rights

This includes specifically enumerated rights such as freedom of speech and of religion, and implied rights such as those of association and privacy. Generally, this constitutional issue does not

appear to have been of central importance in contesting denial, revocation, or suspension of security clearances.

2.1.1 Civil Employees of DOD Contractors and First Amendment Rights

As indicated above, most cases involving civilian employees of DOD contractors only touch on this subject. In *Clifford v. Shoultz*, *supra*, for example, the Court notes: "Shoultz has not raised and we do not now consider, any argument concerning a possible 'chilling effect' that the Industrial Personnel Security Program might have on his freedom of association or whether . . . there is any overriding national interest in compelling his disclosure of his associations." *Id.* at 872, n. 3.

A group of cases, consolidated as *Gayer v. Schlesinger*, 490 F. 2d 740 (D.C. Cir.), *rehearing denied* (Dec. 27, 1973), considered the question of civilian employees who had had their security clearances withdrawn because of evidence of homosexuality. The District Court (*Wentworth v. Laird*, 348 F. Supp. 1153 at 1156 (D.C. 1972)) had held that questions concerning the intimate details of one plaintiff's sex life violated his First Amendment right to privacy, because of the lack of a demonstrated nexus "between the information sought to be elicited and the ability to protect classified information" and this "tainted the fairness of the entire administrative proceedings," *id.*; *see also Gayer v. Laird*, 332 F. Supp. 169 at 171 (D.C. 1971). The Court of Appeals in *Gayer*, however, refused to go this far, holding merely that the questions "exceeded the authority of appellants under their basic charter, Executive Order No. 10865 . . ." *Gayer*, 490 F. 2d at 751. A similar reluctance to address First Amendment issues may be seen in *Harrison v. McNamara*, 228 F. Supp. 406 at 408 (Conn. 1964): "[s]ince Harrison

was discharged because of his false answers, and not because of his past activities in themselves, his arguments regarding limitations on freedom of speech, *ex post facto* laws and unsympathetic associations are ill-taken." In *Dick v. United States*, 339 F. Supp. 1231 at 1234-35 (D.C. 1972), the court held that questions concerning Dick's religious beliefs had violated the plaintiff's First Amendment rights, but noted at the same time that a subsection of DOD Directive 5220.6 expressly precluded such questioning.

Brunnenkent v. Laird, 360 F. Supp. 1330 (D.C. 1973) is one case in which First Amendment rights did play a major role. Here, as security clearance was revoked based on criteria S and N of Directive 5220.6, "[t]he sole evidentiary basis for these conclusions was *various expressions of petitioner's opinions* to his co-workers . . ." *Id.* at 1331. This, the Court held, was "an unconstitutional invasion of his rights under the First Amendment." *Id.* at 1332. The balancing of competing interests was not necessary as "the claimed threat to national security resulting from plaintiff's continued clearance lacks rational support in the only evidence of record and the deprivation of First Amendment rights to express oneself freely in any matter . . . is clear and unambiguous." *Id.*

In *Marks v. Schlesinger*, 384 F. Supp. 1373 at 1377 (C.D. Cal. 1974), however, withdrawal of a security clearance was held to have passed Constitutional muster.

> . . . I am convinced that the questions asked of plaintiff neither exceeded the authority of the defendant under Executive Order No. 10865 nor were they violative of plaintiff's First Amendment rights to privacy. One who seeks employment with the federal government may be

> under a greater obligation to communicate information about himself than the ordinary person.

Id. at 1377. In this case, noted the Court, the specific need for additional information was clearly explained to the plaintiff. Mark's refusal to answer questions about homosexual conduct

> has deprived the Screening Board of essential information needed to make a determination of his continued eligibility for a security clearance. Mark's limited interest cannot and does not outweigh the greater interests of the government in preventing highly sensitive and classified information from falling into the wrong hands. The government is entitled to seek information from an applicant by way of reasonable and relevant questions. . . The information sought as well as the questions asked must not only be relevant to a proper subject of inquiry but no more intrusive of an applicant's privacy than is reasonably necessary to allow responsible officials to make an informed and rational determination that granting or continuing an applicant's security clearance is consistent with the national interest.

Id. at 1377-78.

2.1.2 DOD Civilian Employees and First Amendment Rights

[No relevant cases found]

2.1.3 Military Personnel and First Amendment Rights

Watkins v. United States Army, 541 F. Supp. 249 (W.D. Wash. 1982) involved a security clearance which had been revoked because of admitted homosexuality. Sergeant Watkins, in his amended complaint, argued that this constituted a violation of his First Amendment rights. *Id.* at 254. In its decision, the Court did not reach this issue. *Id.* at 259.

2.2 Fifth Amendment Due Process Rights

Rights asserted under this amendment constitute the major challenge to denial, revocation, or suspension of security clearances. As *Greene v. McElroy*, *supra*, makes clear, "property may be considered to include employment, while "liberty" arguably includes the "freedom to practice . . . [a] chosen profession." *Id.* at 492.

2.2.1 Civilian Employees of DOD Contractors and Fifth Amendment Rights

The Supreme Court in *Greene v. McElroy*, *supra*, failed to reach the question of due process. Instead, the Court held that it first "must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Id.* at 507. President Eisenhower, as we have seen, issued Executive Order 10,865, in response so that a future case with a similar fact pattern would bring this issue squarely before the Court. In the interim, however, the Court has had opportunity to rule on this issue in a related context, involving a cook in a cafeteria concession operated at the Naval Gun Factory. In *Cafeteria & Restaurant Workers Union*, *supra*, this civilian

employee was held to have been lawfully relieved of her security clearance. A "trial-type-hearing" with an opportunity for the individual to "be advised of the specific grounds for her exclusion" and to have a chance to refute them was not required. *Id.* at 894. All that had been denied the employee was the opportunity to work at "one isolated and specific military installation." The government was not regulating or licensing an entire trade or profession, but was rather exercising its traditional control in a proprietary military capacity. *Id.* at 896. This analysis followed the Court's own test:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest . . . as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required.

Id. at 895.

In *Clifford v. Shoultz*, *supra*, the Screening Board requested a personal interview with Shoultz, stating that he might be represented by counsel, could make a statement on his own behalf, and might refuse to answer questions on Constitutional or other grounds. *Id.* at 869. At the same time such refusal could result in the suspension of his security clearance and the discontinuation of further proceedings, which did in fact occur. *Id.* Shoultz sued, objecting to the lack of a "requirement of written specification of

charges; no opportunity . . . to reply to such charges in writing; no opportunity to confront one's accusers; no right of cross-examination; no notice as to the burden of proof; no review of the proceedings." *Id.* at 873. The Ninth Circuit noted that the case involved "the Screening Board's preliminary investigative procedure . . . and suspension of one's clearance as the sanction for . . . refusal to provide relevant information," *id.*, rather than an adjudicatory proceeding such as that in *Greene, supra.* The Court found that this preliminary procedure "to make a factual determination upon which the necessity of a subsequent and fair adjudicatory proceeding depends is not violative of due process rights." *Id.* at 875. Shoultz's real interest was not a right to continued employment, which would have been protected until completion of an adjudicatory hearing, but rather his right to withhold "factual information concerning his continued eligibility for a security clearance."

> This interest cannot and does not outweigh the paramount concern of the Government and the public to prevent classified national defense information from falling into the hands of persons whose reliability and loyalty are not clearly established. Surely an individual seeking a security clearance for the first time could not demand that the Government act upon his request without his supplying the relevant information required of him. . . . The obligation to furnish this information is as great, and possibly greater, after the Government has initially authorized that an individual be given access to classified material. The danger exists that the fruits of access already authorized may be misused, and the question remains whether

> additional classified material should be revealed. . . . A balancing of the interests of all those concerned with the industrial security program, including those already holding security clearances, heavily preponderates in favor of the reasonableness of the requirement that an individual holding a security clearance must, upon, request, submit relevant information to the Screening Board. . .

Id. at 876. Adams v. Laird, 420 F. 2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) involved both the suspension and denial of security clearances due to homosexuality. The Court first disposed of the plaintiff's assertion that an initial interview by the Screening Board involved "unseemly police interrogation practices" which should nullify the use of information developed during its course. *Id.* at 235. Noting that there were lunch, coffee and comfort breaks, that Adams had access to the telephone, that he did not indicate fatigue or object to practices at the time, and that he returned for further conversations, the Court found: "[t]here is nothing in the record to suggest that appellant was in physical custody." *Id.* at 236. Similarly, Adams' failure to object to the absence of a witness for confrontation and cross-examination purposes, his agreement to use the written interrogations, and indeed his stipulation with the government to that effect suggests an absence of "fundamental procedural unfairness" on this point. *Id.* at 237-38. Finally, the court found an adequatly ennunciated standard for evaluation to exist which satisfied notions of notice and rationality, *id.* at 238-39, and that the presence of findings by the Board satisfied the requirements of procedural due process, *id.* at 240.

The combined cases in *Gayer v. Schlesinger, supra*, were partially considered on due process grounds by the Court of Appeals. Finding that the record did not indicate that "ISCRO was applying a per se rule without any consideration of appellee's individual case" the Court was "unable to agree with the District Court that the revocation was based upon the concession of appellee that he was leading an on-going homosexual life, without more." *Id.* at 748, 747. Addressing the question of nexus, the rational connection between homosexual activity and the ability to safeguard classified information, the Court noted that this did *not* require "objective or direct evidence." *Id.* at 750. "What is required is that every application for clearance must be considered in its particular factual setting." *Id.* In this consideration "[s]ome deference must be accorded by the courts to the conclusions of the authorities charged with responsibility under the Executive Order and Directive." *Id.* at 751.

In *McKeand v. Laird*, 490 F. 2d 1262 (9th Cir. 1973), *rehearing denied* (Jan. 30, 1974), another homosexual case, a security clearance was properly denied. "[T]he hearing examiner . . . made specific findings of fact clearly describing why . . . [McKeand's] homosexuality posed a threat of divulgence of classified material. . . . This constitutes a rational nexus. . ."which was supported by substantial evidence in the record. *Id.* at 1263-64.

Several District Court decisions shed further light on the question of due process in this setting. In *Dick v. United States, supra*, it was held that "basic fundamental fairness requires that the government make available to plaintiff's psychiatric witness the same material made available to its own psychiatrist. This result is required since the Hearing Examiner accepted the conclusion of the government's psychiatrist because of the greater depth of his factual

information. *Id.* at 1234. In *Brunnenkant, supra*, the Court ordered plaintiff's security clearance restored, "[s]ince the essence of a fair and impartial adjudication consistent with the Fifth Amendment is not only a due process hearing but also a decision containing findings based on sufficient evidence . . ." *Id.* at 1331-32. In *Marks, supra*, the District Court applied the holding of *Clifford v. Shoultz, supra*, in refusing to justify "an applicant's refusal to answer reasonable and relevant questions." *Marks, supra*, at 1379.

2.2.2 DOD Civilian Employees and Fifth Amendment Due Process Rights

Hoska v. United States Department of the Army, 677 F. 2d 131 (D.C. Cir. 1982), involved the revocation of a security clearance granted an Army civilian employee. In reviewing the record the Court of Appeals held, "that the evidence presented was wholly inadequate to support the MSPB [Merit Systems Protection Board] decision. . . . as the Army's case . . . relied almost entirely on unsubstantiated hearsay evidence." *Id.* at 133. Under Army Regulation AR 604-5, ¶ 3- (May 4, 1972), it was necessary that a nexus be found to exist between the revocation or denial of a security clearance and national security interests. *Id.* at 136-38. In reviewing this nexus, the Court articulated several circumstances demanding "a more concrete showing of a rational nexus between the various allegations of misconduct and indiscretion and petitioner's ability to safeguard sensitive information." *Id.* at 144. These included: 1) a lack of incidents involving classified/sensitive information or its protection 2) no incidents involving the Army or Army work, or which had bearing on petitioner's job 3) the presence of work-related evidence *favoring* the petitioner 4) the lack of

violation of any law, local custom, or Army regulation, and 5) the lack of a "careful analysis" of charges of "immoral" or "notoriously disgraceful" conduct. *Id.* at 144-45.

> [U]nder the circumstances of this case, in order to rely on its evidence of improper or indiscreet behavior . . . the Army was required to show some specific connection between that evidence and petitioner's ability to safeguard the information to which the security clearance gave him access. This . . . . merely compels the Army to comply with the standards of reasonableness and nonarbitrariness in its own Regulation.

Id. at 145. Failure to do so constituted a "critical weakness" in the Army's case.

Recently the due process debate has been sharpened by the Appellate decision in *Egan v. United States Department of the Navy*, 802 F. 2d 1563 (Fed. Cir. 1986). In *Egan*, the Merit Systems Protection Board, an "administrative court" set up under the Civil Service Reform Act of 1978, had refused to review the denial of a security clearance, holding that this power has been specifically delegated to agency heads by Executive Order 10450. In vacating and remanding, the Court of Appeals noted that while agreeing "that the Board is responsible for ensuring that an employee receives due process . . . the Board is also responsible for conducting . . . its other statutory responsibilities. This includes . . . the obligation. . . to review agency actions . . ." *Id.* at 1569. "In Mr. Egan's case, as decided by the Board, the agency that removed him achieves a complete absence of appellate review of the underlying facts by any

tribunal at all, merely by referring to the national security, whether or not that is a supportable reason for the removal." *Id.* at 1571.

> The Board's decision in *Egan* creates the anomalous situation whereby employees removed for national security reasons under 5 U.S.C. S 7512 would be entitled to less process than those removed under 5 U.S.C. S 7532. As discussed above, employees removed under section 7532, although denied Board review, are entitled to a full evidentiary hearing within the agency. Under the Board's decision, Mr. Egan would be given only a written right of reply and neither an agency hearing nor a right of review by the Board on the merits. Mr. Egan and those similarly situated would lose their statutory right to both a hearing and a review of the merits of the agency action if the agency elects removal under section 7512.
>
> The procedure designed by the Board, which the Board characterizes as "minimum due process," is a departure from the Civil Service Reform Act's careful balance of employer and employee interests. This procedure would evict a large class of federal employees from the statutory safeguards that this Act provides. Minimum due process under this Act requires not only minimal pre-termination proceedings . . . but also requires a post-termination hearing . . . . [F]ederal employee due process requires a full evidentiary hearing at some point in the termination proceedings, if not before removal, then after . . . .
>
> This right to a hearing is particularly cogent in the security clearance context.

Id. at 1572-73. The Court concluded that "the heavy weight of law and precedent, congressional intent, and fundamental rights, require that the agency action in *Egan* receive the same appellate review as other adverse actions taken under 5 U.S.C. § 7512." *Id.* at 1575.

In *Harrison v. McNamara*, *supra*, a temporary naval employee was denied a security clearance based on his falsification of personnel forms. Harrison argued that due process required "a trial-type-hearing, with the opportunity to cross-examine adverse witnesses, before the Navy can take an action that would have the effect of depriving him of his chosen career." *Id.* at 408. Despite references to *Greene*, *supra*, the Court found that the procedure followed was specifically authorized by the statute.

> The opinion in *Greene* points out at some length the dangers of injustice when a man is effectively banned from following his trade on the basis of secret testimony. . . . [This] is of minimal importance here, when the denial of the clearance was explicitly grounded on the admittedly false statements of plaintiff, not upon the secret evidence of unnamed informers.

Id. at 409.

Mention should also be made of several Merit Systems Protection Board decisions. While the Federal Circuit's holding in *Egan*, *supra*, called these into some question, that decision is itself the subject of a writ of certiorari to the Supreme Court. The Board in *Egan v. Department of the Navy*, 28 M.S.P.R. 509 at 519 (1985) stated:

> [T]he Board will review the procedures utilized by the agency to ensure that the agency offered the appellant due process. We further hold that the minimal due process rights that must be offered the employee upon the agency's denial or revocation of a security clearance are: notice of the denial or revocation; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond.

See Griffin v. Defense Mapping Agency, 28 M.S.P.R. 506 at 507-508 (1985). *See also Irving v. Department of the Navy*, 29 M.S.P.R. 344 (1985).

2.2.3 Military Personnel and Fifth Amendment Due Process Rights

Watkins, supra, at 254 notes: "[p]laintiff's amended complaint alleges that the revocation of his security clearance violates substantive and procedural due process requirements," but this issue was not reached in the Court's holding. *Id.* at 259.

2.3 Fourteenth Amendment Equal Protection Rights

Equal protection questions have only been raised in one or two cases, yet as *Egan, supra*, indicates their potential impact in security clearance cases is immense. Specifically it remains to be seen whether it may be argued with success that division into civilian employees of DOD contractors, on the one hand, and DOD civilian employees and military personnel, on the other constitutes an "unreasonable classification" violative of the Equal Protection Clause.

2.3.1 Civilian Employees of DOD Contractors and Fourteenth Amendment Equal Protection Rights

[No relevant cases found.]

2.3.2 DOD Civilian Employees and Fourteenth Amendment Equal Protection Rights

In *Harrison*, *supra*, the civilian naval employees contended "that the statutory distinction between permanent and temporary or probationary employees is an unreasonable classification violative of the Equal Protection Clause of the Fourteenth Amendment, as incorporated into the Fifth Amendment." *Id.* at 409. The District Court, however, did not find that statutory distinction rose to such a level.

> Unless there is a constitutional right to a hearing on the part of all employees, it is not unreasonable for Congress to give additional protection to permanent employees, who have been led to expect, by virtue of their having been accepted into that status, that their employment for a period of many years is contemplated.

Id. Additionally, the Federal Circuit in *Egan*, 802 F. 2d 1563, *supra*, appears to have been aware of this problem although it is not *specifically* mentioned in either the decision or the dissent. *See id.* at 1572 ("The Board's decision . . . creates the anomalous situation whereby employees removed for national security reasons under 5 U.S.C. § 7512 would be entitled to less process than those removed under 5 U.S.C. § 7532."); *id.* at 1576 n. 5 (dissent of Markey, Chief Judge) ("The Navy's denial of security clearances to sailors is

immune from supervision by MSPB and this court. It is at best incongruous to insist that the Navy's denial of a security clearance to a civilian employer must not be immune from MSPB supervision.")

2.3.3 Military Personnel and Fourteenth Amendment Equal Protection Rights

Again, this was an issue raised by the plaintiff in *Watkins*, *supra*, at 254 which was not addressed by the Court. *Id.* at 259.

3.0 Current Issues

A review of the cases dealing with DOD security clearances indicates that the great bulk of these fall into three major groupings. *Greene*, *supra*; *Shoultz v. McNamara*, 282 F. Supp. 315 (N.D. Cal. 1968), *rev'd sub nom. Clifford v. Shoultz*, *supra*; *Dressler v. Wilson*, 156 F. Supp. 373 (D.C. 1957); and *Harrison*, *supra*, deal with affiliations or contacts with organizations or governmental entities considered anti-democratic or unAmerican. *Adams*, *supra*, *Gayer*, *supra* (with its constituent cases); *McKeand*, *supra*; *Marks*, *supra*; and *Watkins*, *supra*, deal with exclusions from security clearances based on homosexuality. *Hoska*, *supra*, and *Dick*, *supra*, deal at least in part with alleged mental problems. These groups represent major societal issues which impact on the consideration of security clearances. These groups, as we have seen, draw on many of the same constitutional principles and legal arguments. In addition to specific Constitutional rights, for example, the right of privacy is raised in several of the homosexual cases, *see Gayer v. Schlesinger*, *supra*; *Marks*, *supra*, and it also plays a part in the issue of drug testing cases discussed below. Indeed, several current issues show

potential as a basis for legal challenges to due process security procedures.

3.1 Polygraph Use

The polygraph has been employed on a routine basis as a screening device for employees of NSC, CIA, FBI, and other government agencies, that have to do with the protection of the national security. Although polygraph evidence and techniques are under challenge in the criminal courts, use of the polygraph by DOD and other Federal Agencies has not been challenged legally, almost certainly because the agencies affected have imposed conditions on the use which effectively reduce the possibility of such challenges to a minimum.

In 1923 the Court of Appeals held that polygraph techniques were not sufficiently accepted in the scientific community to be admissible as evidence in a criminal trial, *Frye v. United States*, 223 F. 1013 (D.C. Cir. 1923). The Supreme Court has indicated that statements made in the course of a polygraph examination can be admissible, even if the results of the examination, *per se*, are not admissible *Wyrick v. Fields*, 459 U.S. 42 at 48 (1982). It has also stated, on Fifth Amendment grounds, that the government cannot require a criminal suspect to submit to a polygraph examination. In order for a statement to qualify as admissible, the examination must be taken voluntarily. *See South Dakota v. Neville*, _____ *U.S.* _____ *(1983)*, *Schmerber v. California*, 384 U.S. 757 at 764 (1966).

Today courts are divided on the issue of the polygraph. Some adhere in an orthodox manner to the *Frye* decision while others admit statements made in the course of polygraph examinations, according to the discretion of the judge. In all cases, however,

because of the Fifth Amendment, the prosecution cannot obtain polygraph evidence without the consent of the accused.

In his testimony before the Legislation and National Security Subcommittee of the House Committee on Government Operations, Mr. Richard K. Willard, Deputy Assistant Attorney General, said that the Department was not aware of any litigation in which an employee had challenged the power of a Federal Agency to require a polygraph examination in connection with the administrative investigation of suspected misconduct. However, he noted that there have been a number of cases in state courts on this issue, many dealing with policemen suspected of misconduct. Statement of Richard K. Willard before the Legislation and National Security Subcommittee of the House Committee on Government Operations, at 32 (Oct. 19, 1983) (on Presidential Directive on Safeguarding National Security Information and Polygraph Examination of Federal Employees) [hereinafter Statement of Willard].

Mr. Willard argued that where the polygraph is used for screening purposes, and not for the purpose of investigating alleged criminality or suspected misconduct, there should ordinarily be no Fifth Amendment problem. *Id.* at 29. He argued further that an employee who refuses an order to take a polygraph test, while he may not be liable to any criminal sanction, is subject to a letter of reprimand or suspension without pay or even dismissal. *Id.* at 31.

Mr. Willard also noted that the Merit System Protection Board in *Meier v. Department of the Interior*, 3 M.S.P.B. 341, at 344-46 (1980) ruled that polygraph interviews can be admitted into evidence where an administrative committee is endeavoring to decide whether a Federal Agency has just cause to discharge an employee from the competitive service. In handing down this ruling, however, the MSPB emphasized that the admission of polygraph evidence was limited to

the case before it and that the MSPB did not "imply that taking a polygraph examination will be required under any circumstances or that the results of such a test must be accepted into evidence or accorded any specific weight in the final decision." Statement of Willard, *supra*, 32-34 and 33 n. 30.

Mr. Willard admitted that the polygraph is an imperfect instrument and that it can in certain circumstances give false positive or false negative results. However, he urged that the use of highly sensitive equipment and highly experienced personnel and the existence of stringent guidelines reduces privacy objections to a minimum, and produces results that are up to 95 percent accurate. *Id.* at 14-16, 12.

Department of Defense Directive Number 5210.48, which governs the use of the polygraph by DOD components, contains a number of safeguards to protect the constitutional rights of subjects of polygraph examinations. These safeguards are so substantial that a check with the Pentagon computer revealed not a single instance of litigation brought by a DOD employee or contractor employee directed specifically against the use of the polygraph.

The safeguards written into DOD Directive No. 5210.48 include the following:

> 1. The polygraph shall be employed only when the person to be examined has consented in writing to the examination.
>
> 2. The subject shall be given timely notification of the date, time, and place of the examination, as well as his or her right to obtain and consult with legal counsel. Legal counsel may also be available for consultation during the polygraph examination.

3. Individuals shall be advised of their privilege against self-incrimination. The examinee may at any time, acting either on his own judgment or upon the advice of legal counsel, terminate the polygraph examination.

4. No relevant question may be asked during the polygraph examination that has not been reviewed with the examinee before the examination. Moreover, all questions asked concerning the matter at issue -- other than technical or control questions essential to the polygraph technique -- must have a clear relevance to the subject of the inquiry. All technical questions shall be constructed in a manner that avoids embarrassing or degrading the examinee or compromising his privacy.

5. Questions shall not be asked about conduct that has no security implications or that is not directly relevant to the investigation. Such matters include religious beliefs and affiliations, beliefs and opinions regarding racial matters, and political beliefs and affiliations of a lawful nature.

6. No adverse action shall be taken on the basis of a polygraph examination. When in the opinion of the examiner a polygraph chart indicates deception, the subject will be so advised and shall also be advised of the right to request an additional examination, using the same or different examiner. If the second examination is not sufficient to resolve the doubts, a comprehensive examination of the subject shall be undertaken, using conventional methods. Polygraph examinations shall be considered as supplementary to, not as the substitute for other forms of examination.

7. Applicants for employment, assignment or detail to positions requiring access to specifically designated information in special access programs in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, shall not be selected or assigned if they refuse to take a polygraph examination.

8. Persons who refuse to take a polygraph examination in connection with determining their continued eligibility for access to Secret Compartmented Information, may be denied access to the classified information in question, provided, however, that with the exception of the NSA, the DOD component concerned shall assure that such person is retained in a position of equal pay and grade that does not require such access.

9. Adverse action shall not be taken against a person for refusal to take a polygraph examination in criminal or unauthorized disclosure cases.

The use of the polygraph, under the restraints that have been spelled out, would seem to meet the requirements of due process. This is also suggested by the apparent absence of suits on this matter although DOD conducts several thousand exams a year.

3.2 Drug Testing

Drug testing in positions that involve the public safety or national security is a relatively new phenomenon. For this reason it is perhaps inevitable that the establishment of acceptable procedures should pass through an initial period of uncertainty and apparently contradictory decisions. The constitutional issues presented are exceptionally complex, while the state of the law governing them is currently unsettled. "As the litigation develops at the appellate

level," however, "there are growing indications that the Court of Appeals will not be as hostile to various kinds of drug testing as several District Courts have been in recent opinions." DEPT. OF JUSTICE, DRUG PREVENTION LITIGATION REPORT, no. 5 (Jan. 16, 1987), at [1]. There has been support for this position from the recent decisions of several federal courts: *See McDonnell v. Hunter*, No. 85-1919). (8th Cir. Jan. 12, 1987) (random urinalysis of correctional employees upheld); *National Association of Air Traffic Specialists v. Dole*, no. A 87-073 Civil (D. Alaska _____) (preliminary injunction against periodic drug tests of air traffic control specialists denied).

In *National Treasury Employees Union v. von Raab*, no. 86-3833 (5th Cir. April 22, 1987), the District Court had held that any testing without a warrant and probable cause violated not only the Fourth Amendment but the Fifth and Ninth Amendments as well. *Id.* at _____. On appeal, the Fifth Circuit handed down a decision basically favorable to the government's position. *Id.* at _____. The Court rejected

> a number of claims commonly asserted by plaintiffs challenging drug testing programs: (1) that individualized suspicion of an employee's illegal drug use is necessarily required by the Fourth Amendment; (2) that there must be specific evidence of illegal drug use at a particular workplace to justify any testing under the Fourth Amendment; (3) that there are less intrusive means to identify employees who use illegal drugs; (4) that any testing is unreliable; and (5) that testing violates the procedure against self-incrimination.

DEPT. OF JUSTICE, DRUG PREVENTION LITIGATION REPORT, no. 7 (April 25, 1987). The dissent found the program ineffective and therefore an unreasonable search because five day notice was provided before a test and current employees engaged in sensitive tasks were not tested. *Id.* The Court's majority, however, did not fault the procedures and safeguards followed by the government at any point, although these were spelled out in some detail:

> After the employee surrenders his outer garments and personal belongings, the observer gives the employee a bottle for the specimen. The employee then enters a restroom stall and produces the . . . sample. In order to prevent tampering, the observer remains in the restroom to listen . . . and to collect the sample, but the observer does not actually observe the act. . . . The employee then leaves the stall and presents the bottle containing the specimen to the observer. To ensure that a previously collected sample has not been proffered, the observer is instructed to reject an unusually hot or cold sample.
>
> The Service uses strict chain-of-custody procedures after collection. The observer applies a tamper-proof seal to the bottle, the employee initials a label affixed to the seal and signs a chain-of-custody form, and the observer signifies that the procedures have been correctly followed. The observer then seals the sample in a bag together with other samples and mails the bag to a laboratory where both a tracking system and a chain-of-custody record are maintained.
>
> Laboratory employees test samples for marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP).

> Initially, all samples are screened by the enzyme-multiplied-immunoassay technique (EMIT). Because EMIT yields a significant rate of positive results even in the absence of any use, all positive samples are then screened by gas chromatography/mass spectrometry (GC/MS). Both parties agree that GC/MS provides a highly accurate test for the presence of drugs, assuming proper handling, storage, and testing techniques. If the GC/MS test is positive, the employee may designate a laboratory to test the original sample independently. Because EMIT will generally report the best for any use as negative when five days have elapsed between the last use of drugs and the testing date, the test may fail to detect the prior use of drugs by persons who have abstained for five days.

Id. at _____.

It has been the government's position that:

> drug testing does not implicate the Fourth Amendment because (1) expectations of privacy in the workplace are limited by reasonable conditions of employment that may be imposed to assure fitness for duty, (2) unobserved testing constitutes neither a "search" or a "seizure;" (3) testing constitutes a condition of employment to which employees necessarily consent by their conduct; and (4) if the Fourth Amendment is implicated, governmental interests outweigh any minimal intrusion on personal privacy.

DEPT. OF JUSTICE, DRUG PREVENTION LITIGATION REPORT, no. 2 (October 15, 1986). The fact that there are several *different* kinds of testing - initial, periodic, and random - each appropriate for different circumstances, however, makes any quick solution to the problem unlikely. The procedures to be followed in administering tests will undoubtedly be scrutinized with a view to reducing to a minimum any possible invasion of privacy. To date, there has been no challenge to DOD's program of random testing for military personnel. However, cases brought by civilian employees and employees of DOD contractors are currently before the courts. *See National Federation of Federal Employees v. Weinberger*, 640 F. Supp. 642 (D.C. 1986), *rev'd*, no. 86-5432 (D.C. Cir. May 15, 1987) (District Court has jurisdiction to rule on the merits of a Fourth Amendment challenge to random drug testing of guards and other civilian Army employees in sensitive positions); *Thompson v. Weinberger*, no. R87-393 (D. Md._____) (civilian Army employees challenge to random unobserved drug testing); *American Federation of Government Employees v. Weinberger*, no. CV 486-353 (S.D. Ga. _____) (preliminary injunction issued enjoining drug testing of Army civilian guards. As a "search", testing must be limited to instances where there is reasonable suspicion of illegal drug use. The Court indicates that testing may be allowed in security situations. In addition to other arguments, plaintiffs in this action argued that testing violated due process and an employee's right to privacy.); *Oil, Chemical and Atomic Workers Union v. U.S. Department of the Army*, no. 86-2483 (D.C._____) (suit by civilian employees of government contractors alleging the contractor's drug testing program); *Mulholland v. Department of the Army*, C.A. no. 87-317 (E.D. Va. Apr. 20, 1987) (drug testing of civilian army

employees held to be reasonable in view of the critical task they perform in repairing and servicing aircraft); *Oil, Chemical and Atomic Workers Union v. U.S. Department of the Army*, no. 86-2399-§ (D. Kan. Oct. 14, 1980) (suit by employees of government contractor challenging the contractor's drug testing program transferred to D.C.); *American Federation of Government Employees v. Weinberger*, no 86-242T (W.D. Wash. Aug. 5, 1987) (civilian Army employees challenge to mandatory random drug testing program dismissed on comity grounds.) Monitoring of these cases will provide initial feedback by which drug testing procedures may most properly be judged.

3.3 Merit Systems Protection Board

The role of the Merit Systems Protection Board in security clearances cases has recently been called into question by *Egan*, 802 F. 2d 1563, *supra*. In *Egan*, 28 M.S.P.R. 509, *supra*, at 513, after requesting amicus briefs on the issue, the Board concluded that;

> in an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency offered the appellant procedural due process.

Id. at 519. Several other cases were evaluated and decided under the same rationale. *See Griffin, supra; Irving, supra. But see Egan*, 802 F. 2d 1563, *supra*, at 1569 (which speaks of "*Hoska* . . . a Board

decision based on its full review of the agency's revocation of the petitioner's security clearance, wherein the Board had itself reviewed the agency's decision and held that the removal was supported by a preponderence of the evidence . . . . The Board now repudiates *Hoska*, and its own precedent, not on the merits but on . . . procedural ground[s]. . ."

The Board's position on review, however, was reversed by the Federal Circuit, *Egan*, 802 F. 2d 1563, *supra*. The Court of Appeals held rather that "the Board is required to review the agency action taken against Mr. Egan with the same full process and standard and scope of review, establishing by law and precedent, as any other adverse action taken under section 7512." *Id.* at 1572.

> A person can obtain review of the underlying facts pertinent to criminal conviction or loss of bar certification by appropriate judicial process. In Mr. Egan's case, as decided by the Board, the agency that removed him achieved a complete absence of appellate review of the underlying facts by any tribunal at all, merely by referring to the national security, whether or not that is a supportable reason for the removal.

Id. at 1571. The Court thus appears to view the Board as a link in the chain of due process to which Federal employees are entitled in matters relating to security clearance. While the Court did *not* hold that full review by the Board was a *sine quo non* for due process, this may well be read into the Court's decision.

Egan is currently the subject of a writ of certiorari to the Supreme Court. The Navy's petition notes that, "[t]he decision below thus subjects every denial of a security clearance to a civilian

government employee to de novo review whenever the denial leads to a suspension, removal, or other personnel action reviewable by the M.S.P.B. under Section 7513(d)." Petition for writ of certiorari, no. 80-1552 (October 10, 1986). This would in turn have adverse national security implications. Indeed, courts have generally recognized that the agency head should have the *final say* in such matters. *Id.* at 11. *See also* Executive Order 10450 which *specifically* delegates the power to review security clearances to the heads of the respective agencies.

> Just as courts "are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area," . . . so too are they ill-equipped to review the determination of who may have access to such classified information . . . . The decision, therefore, is one that is committed by "practical necessit[y]" to agency discretion and is inappropriate for outside review because there is, in effect, no law to apply.

Petition for writ of Certiorari, *supra*, at 16. *See also Egan*, 802 F. 2d 1563, *supra*, at 1581 (dissent of Markey, Chief Judge). Other arguments could be marshalled to support this view. As Chief Judge Markey notes in his dissent, the Court's decision requires both the doctrine of Separation of Powers, *id.* at 1580-81, and misconstrues the Board's jurisdiction.

> As this court has so often said, MSPB has only the jurisdiction Congress granted it. . . .Having never specifically granted MSPB jurisdiction to conduct hearings

> on security clearances, Congress has not signalled an intent that MSPB should use the jurisdiction it was granted as authority to inject itself into that sensitive area committed to the Executive branch. This court is not authorized, of course, to grant MSPB a jurisdictional scope so broad.

Id. at 1579. Finally, there is the point brought up by the Board itself that "[i]f the Board were to exercise complete review over the underlying security clearance determination, it would inevitably be faced with agency expositions of highly sensitive materials and Board determinations on matters of national security." *Egan*, 28 M.S.P.R. 509, *supra*, at 518.

It is of course, not possible to state whether the Supreme Court will grant certiorari, or what that Court's decision in *Egan* would be. However, there seems a good argument that the right of appeal to the Board for a de novo hearing may not be essential for due process despite the Federal Court's holding to the contrary.

4.0 Minimum Requirements for Due Process

One specific task of this study is to respond to the question: "What are the minimum requirements for due process for DOD civilian employees, civilian employees of DOD contractors and military personnel in cases involving revocation or denial of security clearances?" This question will be answered, so far as it is possible, by evaluation of the relevant case law within each grouping. Where appropriate, these answers will be followed by discussions embodying our views.

4.1 Civilian Employees of DOD Contractors

This grouping involves the bulk of those court cases related to security clearance. In *Cafeteria & Restaurant Workers Union, supra*, the Supreme Court has indicated that due process procedures turn on "a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* at 895. This balancing test weighs the rights of the individual against the concerns of society in determining due process safeguards for actions denying or revoking security clearances. (*See* text at 6.0). The more necessary a clearance is for a person's job, the greater the due process safeguards required *See Greene, supra*, at 475-76. Similarly, the easier it is to obtain outside employment, and the more localized the denial of access appears to the court, the more likely the court is to dispense with formal procedural safeguards. *See Cafeteria & Restaurant Workers Union, supra.*

It is also clear that what safeguards are present need not be available at all points in the determination. *See Clifford v. Shoultz, supra* (preliminary procedure did not require rights such as cross-examination and confrontation). Additionally, the absence of safeguards will not necessarily result in a reversal or remand where this constitutes harmless error. *See Adams, supra.* Courts have also indicated that governmental interests *may* be greater in cases where employees already hold security clearances. *See Clifford v. Shoultz, supra*, at 876 ("The obligation to furnish this information is as great, and possibly greater, after the Government has initially authorized that a individual be given access to classified material.")

Due process requires a "rational nexus" supported by substantial evidence, *McKeand, supra*, consideration of each application in its particular factual setting, *Gayer v. Schlesinger,*

supra, and probably the absence of *per se* rules; *see id.* Arbitrary or discriminatory procedures are not allowed. *Cafeteria & Restaurant Workers Union, supra*, at 898. Additionally, the Court in *Dick, supra*, held that fundamental fairness in at least some instances required giving an applicant access to germane government files.

As a practical matter, although they have not been the subject of a *direct* ruling, the federal courts have looked with favor on procedures that give an opportunity for confrontation and cross-examination in connection with security clearance hearings. These may *not* be required in all cases. *See Cafeteria & Restaurant Workers Union, supra.* However, as most denials of clearances will presumably involve individuals whose careers would be impacted by a negative decision, *see Greene, supra*, their use in hearings is deemed advisable. Other due process considerations mentioned *but not directly required* by court rulings, include notice, written charges, the right of reply and appeal. Refusal of an individual to cooperate in preliminary investigations has caused several courts to uphold denial or revocation of clearances without ready due process arguments. *See Clifford v. Shoultz, supra; Gayer v. Schlesinger, supra*, at 754; *Marks, supra.* It seems possible, therefore, that an enhanced preliminary procedure could well weed out many security risks without triggering due process questions. Finally, we are unsure as to the validity of the *Clifford* court's arguments concerning governmental interests.

4.2 DOD Civilian Employees

Hoska, supra. Egan, 802 F. 2d 1563, *supra*, and *Harrison, supra*, involve civilian employees of the Department of Defense. The first requires a "rational nexus" like *McKeand, supra*, while *Harrison*, like *Adams, supra*, excuses the absence of due process safeguards in

circumstances when they appear "of minimal importance," *Harrison, supra*, at 409. According to *Egan*, 802 F. 2d 1563, *supra*, minimal due process in these circumstances requires not only certain pre-termination proceedings, but a post-termination hearing as well. The Federal Circuit has held the latter "particularly cogent in the security clearance context." *Id.* at 1573.

It would therefore appear that, assuming *Egan* is not overturned, due process safeguards of DOD civilian employees parallel those afforded civilian employees of DOD contractors. A balancing of state vs. individual interests, however, might vary between the two groups. It could be rationally argued that the Department has an increased interest in the reliability of its own employees as opposed to those of a hired contractor. At the same time, it might be countered that a government civilian employee would stand to suffer more from a denial of a security clearance and would have fewer alternative job prospects than his non-government counterpart. In actual practice, it would appear difficult to differentiate between safeguards which should be offered one group, but not the other.

4.3 Military Personnel

No court case appears to have reached this question. As a practical matter, however, it would appear that the government has an even greater stake in the reliability of its armed forces, than in that of its civilian employees or those of DOD contractors. At the same time, according to *Edison v. Department of the Army*, 672 F. 2d 840 at 845 (11th Cir. 1982)

> A security clearance of any specific level is not a prerequisite for promotion in the Army. Although some

> military intelligence officers require top secret levels of clearability [sic], the level of security clearance does not measure the merit of someone's past service or his potential in the next higher rank. A security clearance is temporary and can fluctuate. The type of security clearance and its level are functions of (a) the officer's job and (b) the necessity for the officer in the performance of that job to have access to the given level of classified information. All officers experience normal reductions in clearance with periodic changes in job.

It would therefore appear that, according to the Supreme Court's balancing test in *Cafeteria & Restaurant Workers Union, supra*, due process safeguards accorded military personnel might not reach the level of those accorded their civilian counterparts.

5.0 Current DOD Due Process Provisions and Constitutional Requirements

A specific question to be addressed is: "How well do current DOD due process provisions meet constitutional requirements?" In addressing this issue, we will go beyond this question to offer suggestions as to how these provisions might be profitably altered.

As has been noted, DOD Directive 5220.6 provides the methodology for ascertaining the suitability of civilian employees of DOD contractors for security clearances. According to the policy definition of August 12, 1985:

> It is the policy of the Department of Defense that all proceedings under this Directive shall be conducted in a fair and impartial manner, and that any determination authorizing a security clearance for access to classified

> information shall be based only upon a finding that to do so is clearly consistent with the national interest. Normally, a security clearance shall not be denied or revoked without full compliance with all applicable due process of law requirements, namely, (1) Notice to the individual of the specific reasons for the action; (2) Affording the individual an opportunity to respond; (3) Notifying the individual of the right to a hearing and the opportunity to cross-examine persons providing adverse information; and (4) Notice of appeal procedures.

DOD Directive 5220.6. In reviewing the case law, it is clear that, since the issuance of the Directive (which was post-*Greene, supra*) no provision of the Directive has been found to fail constitutional scrutiny. Rather, in those cases in which courts have overturned findings on security clearances, it has been the *implementation* of the Directive which has been held at fault. DOD Regulation 5220-2-R should be treated with greater care, because of the decision in *Egan*, 802 F. 2d 1563, *supra*. If this ruling is upheld, the Regulation would require a post-termination hearing to pass Constitutional muster.

This of course leaves open the question of what *leeway* exists to tighten procedures mandated in the regulations, if this should be desired. The following suggestions hopefully indicate some of the areas in which change might be profitably considered.

5.1 DOD Directive 5220.6

The comments herein relate to subsections in the current *draft* of Directive 5220.6:

2. We recommend that (c) be expanded to include medical tests and non-psychiatric evaluations, which would make drug testing available at the preliminary investigating stage. Cases such as *Clifford v. Shoultz, supra*, and *Marks, supra*, indicate that the courts would be willing to justify denial or revocation of a clearance for a refusal to respond. If this is incorporated as grounds for refusing a clearance in 6, the word "require" might be changed to "request", as the result would be the same. It further appears that the words "it may deem necessary" should be added after "interim actions" to retain the sense of the statement.

5. We are concerned about the timing embodied in this section. Requiring the individual to elect a hearing or forego the opportunity *before* seeing the file of relevant material might, in our opinion, raise due process problems for a court.

6. We recommend a sentence to the effect that failure to comply with a request for medical testing or examination, shall be considered to be equivalent to failure to answer, and should result in a suspension or denial of the clearance and a discontinuation of the case.

25. It is unclear how the courts would regard remand to the original examiner. *See Gayer v. Schlesinger, supra*, at 747 (speaking of the *Wentworth* case) ("[i]n view of the history of the case, the proceedings on reconsideration should they occur, must be left to a different Hearing Examiner and a different Appeals Board . . .").

30. We suggest substitution of the words "petition for reimbursement" instead of "brief" to make clear that this procedure does not refer to the appellate process mentioned in 19-21.

31. As in 30, it should be made clear that this refers to the procedure used to obtain reimbursement.

34. The word "execution" should be substituted for "executive."

5.2 DOD Regulation 5200-2-R

The following comments relate to the current Regulations, which became effective on January 1, 1987:

8-200. It should be noted that civilian employees of DOD contractors continue to fall under this regulation as they may be deemed to be "consultant[s] to the Department of Defense" or "other person[s] affiliated with the Department of Defense." *See also* Abstract of the Regulation ("This Regulation applies to DOD civilian, military and contractor personnel. . .") Should a dual approach to security clearances be retained, it is desirable for such employees (and Directive 5220.6) to be listed as another exception in addition to Red Cross/United Service Organizations employees.

8-201.d. We feel that it should be made clear that this opportunity is contingent upon an adequate reply under 8-201.b. As now worded, the possibility is also left open that a court might find a suspension while an appeal was pending to constitute an "unfavorable administrative action," so that exceptions under the terms of 8-102 or 8-202 should be specifically allowed.

The question of whether DOD civilian and military personnel should be guaranteed the same due process safeguards accorded civilian employees of DOD contractors under Directive 5220.6 will be discussed in section 7.0 below.

6.0 Personal Rights v. National Security: A Balancing Test

Another of the specific tasks to be addressed in this study is to respond to the question: "Where do the courts stand on the issue of security clearances and property rights?" This question has, upon agreement with the alternative group, been taken to include *both*

liberty and property rights which pertain to the individual in his employment.

As was indicated in *Cafeteria & Restaurant Workers Union, supra*, at 896, the balancing of the interests of individual and state is useful in an initial determination "of what procedures due process may require under any given set of circumstances." In that case, revocation of a security clearance without notice or hearing was upheld, as the cook involved had only been denied the opportunity to work at a single specific military installation, *id.* at 896. Far from involving a general regulation or licencing of a trade, the government action was that of a proprietor. *Id.* at 898.

In *Greene, supra*, on the other hand, it is obvious that the Supreme Court felt that more serious consideration must be given due process. While refusing to decide the case on Constitutional grounds, the Court noted that: "petitioner's work opportunities [as an aeronautical engineer] have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure." *Id.* at 508.

> Petitioner was discharged from his employment solely as a consequence of the revocation because his access to classified information was required by the nature of his job. After his discharge, petitioner was unable to secure employment as an aeronautical engineer and for all practical purposes that field of endeavor is now closed to him.

Id. at 475-76. It is therefore correct as a generalization to say that the more open the field of employment involved, the more restricted the denial of security clearance, and the less likely it is to be seen

as a "badge of disloyalty or infamy," the fewer due process procedures are required by the courts. At the same time, *Cafeteria & Restaurant Workers Union, supra*, at 898, notes that the government does not have the complete freedom of action enjoyed by a private employer, and that denial or withdrawal of clearances may not be particularly arbitrary or discriminatory in nature. A case by case evaluation is necessary, reviewing the facts of the situation, rather than operation by a *per se* rule. *See Gayer v. Schlesinger, supra*, at 748. Additionally, enunciation of the government interest involved is necessary, and a strict rational nexus is required for questions asked in a security clearance investigation, *id.* at 751, and for findings in the denial or withdrawal of such a clearance, *Hoska, supra*, at 144-45. The nexus principle, however, has its problem:

> A presumption of a nexus, or of a potential nexus, in such cases, would certainly not be unreasonable indeed, on a common-sense basis, most ordinary mortals would favor such a presumption in the interest of not putting the government or the armed forces at risk. As the rules are interpreted and applied today, however, such risk is apparantly considered a matter of secondary importance.
>
> The nexus principle is badly flawed for another reason. It is frequently impossible to provide proof of the existence of a nexus before an applicant has worked on the job for a while. Once an applicant has been put on the payroll, however, it becomes extremely difficult to get rid of him - despite the fact that he is theoretically on a years probation - because the criteria for seperation are much more stringent than the criteria governing initial employment.

MARTIN, *op.cit.*, at 43. What is clear is that in balancing the interests involved, doubts should be resolved on the side of national security. A security clearance adjudication is obviously different in nature from a criminal case where doubts would, of course be resolved in favor of the individual defendant.

As a practical matter, if one wishes to minimize worries raised by due process considerations, this could be done by ensuring availability of employment and opportunity for advancement for those *not* holding such clearances, by restricting the scope of denials or the scope of the clearances themselves, by adding logical (non-arbitrary or discriminatory) grounds for clearance denial which would *not* be viewed as "badges," or by severely restricting information that denial or withdrawal of a clearance had occurred. At the same time, attempts should be made to specifically define state interests, both in providing grounds for denial, and in making available all relevant non-classified information to those without clearances.

7.0 Implications for DOD Policy Makers

The final question asked is: "Are there implications in the analysis for DOD policy makers?" The conclusions which follow are those recommended by us in the course of this study.

* An analysis of relevant court cases indicates that the *policies* formulated by DOD in regard to security clearances since *Greene* have generally been found to pass constitutional muster.

* Recent innovations and social changes, in particular the use of polygraph tests and drug testing, have implications for due

process in security clearance matters. While it does not appear that major changes are necessary to accommodate due process challenges in these matters, the situation should continue to be monitored.

* Adverse rulings on security clearances have usually been due to faulty *implementation* of DOD policy; thought should therefore be given to ways in which these policies may be consistently and correctly implemented (directives, training for those involved, etc.)

* Equal protection problems may be raised by the use of different standards for different classes of employees if such differences cannot be justified.

The two latter conclusions require further discussion. Regarding implementation, several books and reports have alluded to the importance of producing a quality corps of adjudicants who are expert in the field of personnel security. *See* MARTIN, *op. cit.*, at 83-84; Statement of Thurman, *supra*, at [6]; TASK FORCE ON PERSONNEL INVESTIGATIONS AND ADJUDICATIONS, 2 PROJECT 10: DOMESTIC COUNSEL COMMITTEE ON THE RIGHT OF PRIVACY, pt. 3, at 38-42 (Feb. 1975). Training such a group would serve the dual purpose of protecting employees by providing skilled adjudication of due process questions and protecting the Department by providing consistent and scholarly decisions on national security matters. It is necessary to focus on several issues in this regard: qualification for the position to pre-adjudacation training, including courses and handbooks, and adequate suprevision. Improvement in these areas would require an upgrade in salary and status for

adjudicators. Any funds spent on this would, in our opinion, be more than repaid by savings down the line due to fewer security breaches and fewer contested decisions. At the same time it is necessary to insure a *consistency* in implementing due process requirements. *See* Statement of Thurman, *supra*, at [6]-[7]. The final point on equal protection brings us back to the background issue of "whether . . . two distinct approaches to due process should continue, or if there should be a uniform policy for civilian DOD employees, military personnel and contractor employees." It is our opinion that equal protection problems are possible in using different policies for civilian employees of DOD contractors and of DOD itself. While such arguments might also be made by military personnel, it is our feeling that these would be less likely to meet with success. Our three recommendations in this connection, are therefore as follows:

* Adopt similar security clearance procedures and due process safeguards for civilian employees of DOD contractors and DOD civilian employees.

* Consider the institution of an appellate hearing with cross-examination and confrontational rights for military personnel OR produce a well-documented study as to why these procedures are not considered to be in the national interest where security clearances are involved.

* Increase use of preliminary questioning and examination for all groups to screen out security risks as these, when combined with a *subsequent* hearing with due process safeguards, will generally be upheld by the courts. This approach is indeed supported by the fact that non-employees

have fewer "rights" than individuals who have already been employed. *See Egan*, 802 F. 2d 1563, *supra*, at 1576 n. 4 (dissent by Markey, Chief Judge); MARTIN, *op. cit.*, at 43.

These recommendations, could, of course, be implemented at the Department level, but should be considered in the drafting of the new Executive Order.

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A REVIEW OF THE REPORT SUBMITTED BY JOHN NORTON MOORE

PURSUANT TO CONTRACT NO. N62771-87-M-0181

"AN INVESTIGATION OF CASE LAW PERTAINING TO DUE PROCESS FOR DOD PERSONNEL WITH DENIED, REVOKED, OR SUSPENDED SECURITY CLEARANCES"

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and Statement of Work

September 30, 1987

Although arrived at from different directions, in many important respects Professor Moore's approach is consistent with the analysis contained in our paper. For example, although Professor Moore does not spend a great deal of time analyzing when a hearing is due[1], he appears to be in basic agreement with us that the hearing, when it is provided, needs to be a meaningful hearing including, for example, the right to cross-examination.

Perhaps most importantly, Professor Moore has urged that it is legally preferable to provide uniform procedures for civilian employees of DoD and civilian employees of DoD contractors (see, e.g., Moore paper at 37 and 46). We think his arguments (largely based on equal protection grounds) add additional fuel to our suggestion that for legal and practical reasons, the level of uniform procedural protection provided to both classes of persons will be high -- no less than that which must be provided to civilian employees protected by Civil Service Reform Act procedures.

There are two major areas in which Professor Moore's paper devoted substantial attention but were not covered in our original paper: Constitutional issues aside from procedural due process and the use of lie detectors, drug testing and similar investigative techniques.

In both regards, we view these matters as related to but not central to the scope of the work statement's description. We do not, therefore, respond in depth to these two matters. However, we believe it important to explain why these two matters should not be considered as part of an evaluation of the procedures that are required by the Due Process Clauses of the Fifth and Fourteenth Amendments. We are concerned that in this context, these issues will divert attention from the need for procedural due process for both the liberty and property interests identified in our paper. Professor Moore seems to be saying that the increased use of screening tests of one sort or another and substantive protections like free speech makes the need for extending procedural due process not so important. We continue to believe that the recognition of liberty and property rights for all affected individuals is of central importance. In so doing, we do not dispute the importance of protecting substantive rights, such as free speech. We, however, believe that the correct focus is on procedural protections.

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[1]This is particularly true with respect to when liberty interest are implicated. While Professor Moore appears to acknowledge that the courts will require a Codd hearing where a denial/revocation of a clearance imposes a "badge," it appears that Professor Moore asserts that DoD should use logical, non-discriminatory, non-arbitrary, criteria that would not be considered "badges" (see Moore paper at 44). As a practical and legal matter, we question whether that is a realistic option.

1. Professor Moore's analysis included discussion of substantive Constitutional protections, e.g., First Amendment rights, and substantive due process and equal protection rights protected by the Fifth and Fourteenth Amendments[2]. As we noted in our paper (at pages 10-37), the procedural due process protections are triggered when government actions result in the deprivation of a property or liberty interest. If there is no property or liberty interest implicated, there is no process due. If no process is due, or any process due is provided, there still may be a Constitutional violation because another Constitutional protection is violated. What other Constitutional rights are held by DoD civilian employees, employees of DoD contractors or uniformed personnel, and what actions may constitute deprivations of those rights, are matters independent from procedural due process questions. The existence of these rights do not lessen the concern that appropriate due process is not currently provided to all levels of employees.

For example, all the process in the world (including a jury verdict following a full-blown trial) will not render lawful the discharge of a DoD employee on the grounds that he is black or the withdrawal of security clearances on the basis of race. In such cases, process cannot cure substantively unlawful decisions. Substantive illegality might be based on the deprivation of a particular Constitutional right (e.g., First Amendment right of association or speech), or because the action violated substantive equal protection or substantive due process protections.

The substantive due process standards are quite similar to the "nexus" requirement discussed at length in the Hoska and Egan cases, in Doe v. Casey, as well as in Professor Moore's paper. However, as is clear these rights do not apply to all employees in all situations and do not resolve the issue of procedural due process. These substantive standards range from (i) the appropriate criteria to be utilized in determining whether a person should be given or permitted to retain a given level of clearance; (ii) whether the substantive standards applied may be different depending on a person's status as a DoD civilian employee, employee of a civilian contractor, or member of the uniformed services; or (iii) the impact of various statutes on the "reviewability" of the those substantive decisions by the courts.

For example, as Professor Moore correctly notes, many of the cases concern discharges or clearance denials involving homosexuals. And our paper discussed the recent case of Doe v.

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[2]It is not clear why Professor Moore's analysis of substantive Constitutional protections focused on only some of the various Constitutional rights that might be implicated in security clearance/revocation cases.

Casey, in which the CIA discharged a civilian employee who was openly homosexual. We discussed that case, however, not to address the substantive question of whether homosexuality can be a disqualifying characteristic, but rather whether a loss of clearance and discharge based on open homosexuality triggered a right to a hearing. Whether there is a right to and purpose for a name clearing hearing is the procedural due process question. The substantive issues are important, but analytically distinct[3]

Indeed, the essence of the liberty interest procedural due process cases is that the correctness of the underlying decision is completely irrelevant. Even if it is subsequently determined that the underlying decision were erroneously made, absent a property interest in the position, the "name clearing" liberty interest hearing will have no impact on the underlying clearance decision. This critical point can be made clear by the following example: Assume a DoD civilian employee "A" who is a weapons analyst, but has no property interest in his position. Therefore, he may be discharged for virtually any reason, except one that violates another Constitutional or statutory right (e.g., because he is black). If A were discharged because he was suspected of being an agent for a foreign power, he would have no right to challenge the discharge. What he would have is a right to challenge the deprivation of his reputational liberty interest caused by a discharge premised on being a spy. Even if A could clear his name by showing that he was not a spy for a foreign power, he would have no right to get his job back. While there might be no reason not to give him his job back, retrieving the position is not an available remedy.

Likewise, a decision that is substantively sound can be unlawful in the manner in which it is decided. That is the essence of procedural due process protections of property interests, which establish the minimum process required in order to assure that decisions are arrived at through fair processes, which are more likely to arrive at correct decisions (i.e., processes that do not afford the aggrieved person with a fair method of contesting the charge against him or the preliminary decision). Therefore, to demonstrate by another example, suppose A, our weapons analyst, had a property interest in continued employment, and is discharged because of his spying for a foreign power. If the government failed to provide him with any hearing right, his discharge would be deemed unlawful whether or not one could lawfully discharge a foreign spy if one followed minimally fair procedures. The point again is not whether the decision was in fact correct, but whether fundamentally fair procedures were followed in order to permit the person an opportunity to contest the decision.

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[3]The law in this area may be more unsettled than one might have thought. See High Tech Gays v. Defense Industrial Security Office, 56 U.S.L.W. 2144 (N.D. Cal. Aug. 19, 1987).

Whether the ultimate decision rendered is correct (legally, morally or otherwise) should not be considered in determining the appropriate level of procedural due process applied in a particular case. The questions should be: is a property or liberty interest implicated, and if so, what process is due. Of course, virtually by definition, one would reasonably expect that the process will bring out the truth.

We do acknowledge that the substantive issues can have a bearing on the procedural issues in at least three ways. First, the grounds for discharge or revocation of clearance can provide a context justifying speedy or summary action. Accordingly, few would question the constitutionality of removing a person who is reasonably suspected of being a spy from continued access to secret materials pending the outcome of a hearing.

Second, the substantive criteria cases usually analyze whether there is an underlying property right (e.g., a civil service requirement that adverse action be supported by "cause"). As we have discussed, what constitutes "cause" is less important to procedural due process analysis than the effect of the "cause" standard in creating a reasonable expectation of continued employment.

Third, the broader the permissible grounds for denying a clearance, the less likely it is that liberty interests will be implicated. For example, if it were lawful to revoke the clearance of any person whose parents were born outside the United States, it is unlikely that the American born son of English parents would suffer reputational injury as if his clearance were revoked or denied. Professor Moore emphasizes this point. While it is valid as far as it goes, we think that its reach is fairly short.

Additionally, it is important to understand that some differences in analysis flowed from the fact that Professor Moore's analysis borrowed almost exclusively from cases involving the few DoD clearance/discharge cases, rather than from the wider body of law relating to due process protections. One cannot, however, analyze the issue without considering closely the landmark cases that have defined property and liberty rights -- cases like Roth, Perry. As a result, Professor Moore, relying on Cafeteria Workers, suggests that whether there is a right to a hearing turns on a balancing of interests.

It is critical not to combine the two very separate stages of the procedural due process analysis. Whether any process is due is decided by first analyzing the nature of the interest affected. Only if property or liberty interests are implicated is there any consideration of what kind of process is appropriate. Once it is determined that a property or liberty interest is implicated, the government is obligated to provide a fundamentally fair process.

There is not a balancing test in defining protected property or liberty interests. Although property interests are defined by expectations established by law, regulation or historical practice, one does not define the nature of the interest by taking into account the procedures set out by that law, regulation or historical practice. Once it is determined that a property or liberty interest is implicated a Constitutional threshold is crossed, and the court will not look back and view the procedures established by law, regulation or practice as limiting the constitutional minima that would otherwise be applicable. The Court has been consistently clear on this point ever since six justices rejected the contrary approach in Arnett v. Kennedy. This matter was discussed in some detail in our paper at pages 12-13.

There is a balancing of interests in deciding what process is due, as defined by the criteria set by the Court in Mathews v. Eldridge (as discussed in our paper at pages 38-40). Inasmuch as the Mathews criteria reflect consideration of the governmental interests, including administrative burden, the courts will naturally be reluctant to disturb the specific elements of Congressionally or administratively dictated procedures. Unless, of course, the procedures as a whole, fail to provide fundamental fairness.

2. Professor Moore's paper advocated the use of drug testing, polygraph testing and similar investigative techniques as a method to "screen out security risks." We did not in our paper evaluate specific investigatory techniques, although we noted that the case law indicates that DoD may compel cooperation at the investigative stage (see our initial paper at pages 42-43). Although such techniques may very well have an impact on the rights of DoD civilian employees, employees of civilian contractors and those in uniform, we understood our task was to focus on the procedures that must (or should) be used in hearings compelled by the Due Process Clause. We discussed the circumstances that trigger the right to some kind of a hearing, and the structure and function of such hearings. We did not think it relevant to focus on pre-hearing procedures that might be utilized.

We understand Professor Moore to recommend a variety of techniques (e.g., drug testing and polygraph testing) to screen out security risks in two ways. Professor Moore urges fairly clearly that in his view due process considerations can be avoided if an adjudication of clearance is not reached because the subject of an inquiry fails to cooperate by submitting to testing. His paper also suggests that these techniques will yield relevant and useful information that will be valuable to security clearance decisions.

In both respects, Professor Moore's views appear driven solely by giving overriding importance to finding and weeding out individuals who should not have security clearances. We, of course, do not question the need to be able to deny or revoke

security clearances to protect national security interests. What we think must be considered is the price paid by the extensive use, if not over-use of the procedures that Professor Moore has advocated.

Cause based testing should be the rule rather than the exception. Blanket testing of all employees for drug or alcohol abuse raises significant privacy concerns. If there is a performance impairment concern or a reasonable basis for suspicion, testing may be appropriate. However, all of these solutions create their own problems. The testing question raises complex issues, wholly apart due process considerations, that warrant careful evaluation.

CONCLUSION

We believe that as a result of both our paper and that of Professor Moore, DoD has obtained a full airing of procedural due process issues. While bringing different perspectives to the issues, the two papers agree on many fundamental questions -- which should be of value to DoD.

Chapter 3

Legal Analysis by Ronald L. Plesser, et al.

ANALYSIS OF

CONSTITUTIONAL DUE PROCESS REQUIREMENTS

AND

U.S. DEPARTMENT OF DEFENSE

POLICIES AND PROCEDURES

FOR THE DENIAL AND REVOCATION

OF SECURITY CLEARANCES

Pursuant to
Contract No. N62271-87-M-0181
dated March 25, 1987
and
Statement of Work

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EXECUTIVE SUMMARY

The denial or revocation of a security clearance will in many if not most cases have an adverse impact on a person's current or future employment opportunities. As a consequence, the minimum Constitutionally adequate uniform procedures must assume such adverse impact. Otherwise, those procedures will be inadequate in some cases, even if there are circumstances where no liberty or property rights are affected. Rather than seeking the lowest common denominator, uniform procedures must seek the highest level of protection likely to be required; and for many circumstances that level is quite high.

Property Interests. Many though not all civilian DoD employees have a Congressionally endowed property interest in continued employment with no loss of grade or pay. For those in the competitive service and preference eligibles, adverse action may only be taken pursuant to the procedures contained in 5 U.S.C. §7513, or, in the event of a suspension or dismissal, alternatively under 5 U.S.C. §7532. In either case, nothing in a revised Executive Order can diminish the requirements imposed by Congress under the Civil Service Reform Act. Therefore, whenever the denial or revocation of a security clearance would result in adverse action triggering the procedures contemplated by 5 U.S.C. §§7512 and 7513, those procedures must at a minimum be provided, even if they exceed the requirements of due process.

Likewise, many civilian contractors protect their employees against discharge by assuring them continued tenure in the absence of "cause" or other disqualifying basis. Such protections may be embodied in collective bargaining agreements, individual contracts or even in employee guides and handbooks. If the government's denial or revocation of a clearance has the effect of adverse action, against which protection is provided by contract (or common practice), then employee property rights will trigger due process protections. It simply will not be known, or knowable, which contractor employees are protected by private contract provisions. Again, a uniform clearance denial or revocation process must rise to a level that will provide such employees no less than the minimum process due.

On the other hand, we assume that some civilian employees of DoD, some civilian employees of DoD contractors and uniformed personnel have no property right to continued employment or appointment. However, as we have noted, the price that must be paid for a uniform system applicable to all such persons (or even two systems divided along the lines of Executive Orders 10450 and 10865) will provide some persons with more procedural protections than they would otherwise be entitled on account of their "property interest" in continued employment without loss of pay or grade.

Liberty Interests. Moreover, even assuming that there are no property rights at issue (such as is the case, for example, for probationary DoD civilian employees and uniformed personnel), any denial or revocation of a security clearance may implicate liberty interests. We know from a review of the case law that whether liberty interests are implicated depends on the particular circumstances involved.

Liberty interests can be implicated in the employment context when the government takes action (e.g., terminates or denies employment), and disseminates or makes available a stigmatizing basis for the action. Even assuming that in some cases no liberty interests will be implicated, many cases will present that impact. Certainly, liberty interests will be impacted wherever the basis for the denial or revocation of a security clearance forecloses future employment opportunity within or without the federal government. We think it reasonable to expect that for most persons the denial or revocation of a security clearance is, as a practical matter, a badge of dishonor that will prejudice if not foreclose a class or range of opportunities. The government simply cannot assure that such consequences will never flow[1]

The Process Due. The "process due" when liberty or property interests are implicated is notice and an opportunity to be heard at a meaningful time and in a meaningful manner. What is "fair" depends on a variety circumstances.

As noted above, any procedures applied across the board must, by definition, provide to all at least those minimum protections that must be afforded to any one group or class of persons, even if such protections would not otherwise be required in all cases. Therefore, from a legal and policy perspective, any uniform procedure to be adopted by Executive Order must assume that the denial or revocation of a security clearance will always implicate the property and liberty interests.

As a practical matter, it will be difficult to establish a uniform set of procedures that does not provide at least the

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[1]We think it unrealistic to suppose that another agency will second guess an intelligence agency's denial or revocation of a person's security clearance. As a result, the government sits on the horns of a dilemma. On the one hand, if a government agency, particularly an intelligence agency, has made a determination that a person should either not be granted a security clearance or that such clearance should be revoked, the rest of the government, as a potential employer of such person, should have access to that judgment. Yet the mere fact of that access, and the acknowledged reason for it, provides, in large measure, the basis for a claim that the denial or revocation of the clearance will significantly foreclose future employment opportunities.

protections set forth in 5 U.S.C. §§7513 and 7532. Otherwise, in any individual case, the policy must inquire whether the revocation or denial of the clearance constitutes adverse action triggering the requirements of the CSRA. Some pre-deprivation process must be provided unless, as Section 7532 permits, national security mandates summary suspension pending dismissal. The essence of the pre-deprivation process due is "an initial check" against mistakes. More elaborate procedures may be provided later, as even Section 7532 recognizes.

The single most intriguing question in our judgment is the appropriate balance between national security considerations and the individual's due process right to know the bases for the government's decision, and to confront and cross-examine those who have testified or produced evidence against them. In 1959, in Greene v. McElroy, the Supreme Court, in compelling fashion, rejected as inconsistent with fundamental fairness (i.e., due process) for Mr. Greene to be denied a security clearance without an opportunity to confront and cross-examine those government informants who supplied the underlying basis for the denial. We think that Executive Order 10865, issued by President Eisenhower in response to Greene, did well to wrestle with the problem of reaching an appropriate balance between the competing governmental and individual interests. Wherever possible, the government should look to rely on non-confidential information in making and supporting its clearance decisions. Where that is not possible, the government should seek to disclose as much as is consistent with national security to provide the individual a "meaningful opportunity" to contest the information providing the basis for the security clearance revocation/denial decision and the stigma associated with that decision. This includes not only learning the true basis for the decision, but the right to confront and cross-examine witnesses against him. Even this approach, while providing more than some might prefer, does not go as far as others believe necessary.

Indeed, Justice Douglas had persuasively argued:

If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his "liberty," they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise[2].

Under that formulation, the government could never rely on a confidential informant. Executive Order 10865 and Directive 5220.6

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[2]Peters v. Hobby, 349 U.S. 331, 352 (1955) (Douglas, concurring).

should, therefore, be seen as presenting a moderate compromise position that attempts to balance the competing interests.

While due process is not rigid formula to be applied, the Constitution does require that fundamental fairness be provided. As a matter of public policy, much less Constitutional imperative, we think DoD should be loathe to be abandon the procedural protections considered rudimentary to fundamental fairness by the Supreme Court almost 30 years ago in Greene v. McElroy and adopted by President Eisenhower in Executive Order 10865.

INTRODUCTION

This report responds to the series of questions contained in the Statement of Work concerning the requirements of due process and Department of Defense ("DoD") directives for the revocation or denial of security clearances for DoD civilian employees, civilian employees of DoD contractors, and military personnel. See Statement of Work, Contract N62271-87-M-0181. The essential thrust of our effort was first to analyze the requirements of procedural due process in the clearance revocation and denial setting, and compare those requirements with the procedures established by Executive Orders 10450 and 10865, as implemented in DoD directives 5200.2-R (civilian and military employment); 5220.6 (clearance of employees of contractors); DOD Directive No. 5210.45 (clearance procedures for NSA personnel); DCI Directive 1/14 (across the board procedures and criteria for clearance to sensitive compartmented information).

Our review and analysis has borne in mind the historical context in which the DoD's basic clearance procedures evolved. Executive Order 10450 was issued by President Eisenhower in 1953, in the midst of the post-war concern over communist infiltration of the civil service. The stated purpose of the Executive Order was to provide a mechanism of assuring that civilian employees are "reliable trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States" such that their employment "is clearly consistent with the national security."[1] The Supreme Court, however, in its decision in Cole v. Young[2], ruled that the Executive Order could not lawfully extend beyond clearances for employees engaged in "national security" activities, i.e., sensitive positions. Therefore, what may have begun as a general employment "loyalty" test evolved into a mechanism for clearing employees for sensitive positions.

At the same time, the Defense Department had in place security clearance procedures for civilian employees of contractors, which were not authorized by any act of Congress or order of the President. Those procedures, which, among other things, did not provide for such employees to confront confidential informants against them, were struck down by the Supreme Court in Greene v.

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[1]Executive Order 10450 was preceded by legislation enacted on August 26, 1950, which amended the Veterans Preference Act to permit the summary suspension of employees of certain agencies on national security grounds. That Act permitted the President to extend its application to other agencies, which President Eisenhower did by issuance of Executive Order 10450.

[2]351 U.S. 536 (1956).

McElroy.[3] In Greene, the Court dwelled on the issue of confrontation and cross-examination as elements fundamental to the concept of fair procedures. While strictly decided on the basis of lack of Presidential or Congressional authorization, the Greene decision has a strong Constitutional aura - and has always been understood as a key decision under the Due Process Clause. As a direct result of the Greene case, in 1960 President Eisenhower issued Executive Order 10865, which expressly recognized that "it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment." Accordingly, President Eisenhower further recognized that the Executive Order's security clearance provisions and procedures "recognize the interests of individuals affected thereby and provide maximum possible safeguards to protects such interest." Thus, on this basis it is entirely understandable why the procedures adopted in Executive Order 10865 are relatively detailed and more comprehensive compared to the requirements imposed by Executive Order 10450, issued before the Greene decision, seven years earlier.[4]

The essence of the procedures now used in DoD clearances finds its source in the Eisenhower years, during the McCarthy and post-McCarthy period. Yet, since the adoption of the Executive Orders, the "law" has continued to evolve, as the Supreme Court and the other Federal courts, in numerous cases, have considered the scope of the "liberty" and "property" interests protected by the Due Process Clause, and the process due when such interests are adversely affected. While this paper attempts to analyze current DoD procedures in light of the most recent case law, few cases have recently considered DoD clearance procedures. Therefore, our analysis gives strong consideration to the historical context in which these procedures developed, including the seminal Supreme Court decisions which enunciated the key principles that continue to guide judicial analysis of the Due Process Clause.

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[3]360 U.S. 474 (1959).

[4]By issuance of such detailed procedures, including procedures generally providing for confrontation and crossexamination, the President avoided the question technically left open by the Court in Greene, i.e., whether authorized procedures (e.g., pursuant to an Executive Order or act of Congress) that did not provide for such rights could pass Constitutional scrutiny.

I. DUE PROCESS AND GREENE v. McELROY

The starting point is the language of the Due Process Clause of the Fifth Amendment to the Constitution, which provides: "no person shall be deprived of life, liberty or property, without due process of law." A two step analysis is thus triggered. What interests are encompassed by the concepts "liberty" and "property," and what process is "due" in the event governmental action causes a deprivation of either a property or liberty interest.[5] These questions are not answered by the rigid application of detailed rules.

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional# concepts ... purposely left to gather meaning from experience ... ."[6] Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[7]

Therefore, given the somewhat fuzzy character of the standards, it should not be surprising that a review of the Supreme Court's decisions, as well as those of the lower Federal courts, are not always the models of clarity or consistency. Sometimes this task is additionally difficult because the Justices are so divided that issues of substantial importance have been decided without a majority of the Court agreeing on much but the ultimate result in the case.[8]

The starting point of our analysis of due process in the security clearance area is the Supreme Court's decision in Greene

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[5]We focus on the Fifth Amendment's Due Process Clause, which is applicable to Federal governmental action. Parallel protection is provided against State governmental action by the Fourteenth Amendment's Due Process Clause. Accordingly, the Supreme Court has considered relevant "decisions interpreting# either Clause." Paul v. Davis, 424 U.S. 693, 702 n. 3 (1976).

[6]Board of Regents v. Roth, 408 U.S. 564, 571 (1972), quoting, National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, dissenting).

[7]Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. #/123, 163 (1951) (Frankfurter, concurring).

[8]For example, in Arnett v. Kennedy, 416 U.S. 134 (1974), one of the Court's most important cases concerning the due process rights of federal workers, the lead opinion could muster support from only three of the Justices, two of whom are no longer on the Court.

v. McElroy, 360 U.S. 474 (1959). Greene, decided in 1959, was, as noted earlier, directly responsible for the issuance of Executive Order 10865 by President Eisenhower, which in turn provided the basis for Directive 5220.6.[9] Although decided nearly thirty years ago, Greene remains a dominating decision in due process analysis.

The Greene case concerned the revocation of a security clearance issued to an aeronautical engineer employed by a civilian contractor. Because the clearance was essential for employees to be able to perform the contractor's various work for the armed services, the revocation of the clearance resulted in the termination of the engineer's employment. The gist of the charges against the engineer were that he had associated with communists and visited officials at the Russian Embassy.

Because the security clearance revocation procedures were then in evolution, the engineer received more than one opportunity to contest the revocation at administrative hearings and in appellate administrative reviews. The engineer was represented by counsel and had the opportunity to call witnesses to testify in support of his position. However, the government presented no witnesses and did not identify the sources of its allegations against the engineer (either those who gave statements to the government or the government investigators), except to provide him with a summary of a confidential report upon which the charges were based. In addition, security considerations were cited as the basis for denying the engineer's request for the "detailed statement of findings supporting" the decision to revoke the clearance. 360 U.S. at 489-90.

Three facets of the case were key to the Court's decision:

1. The security clearance program and the procedures it utilized were established by various directives from the Department of Defense and the service branches. "None was the creature of statute or of an Executive Order issued by the President." 360 U.S. at 495 (footnote omitted).

2. The loss of the security clearance resulted in the termination of the engineer's employment with the civilian contractor and, as a practical matter, resulted in foreclosing the opportunity of continued activity in his chosen profession.[10]

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[9]See, e.g., Smith v. Schlesinger, 513 F.2d 462, n. 1 (D.C. Cir. 1975) and Clifford v. Shoultz, 413 F.2d 868, 870 (9th Cir), cert. denied, 396 U.S. 962 (1969).

[10]The engineer had shown not only that he lost his job with the government contractor, but also that he was effectively barred from the aeronautical engineering profession because of the aircraft industry's heavy reliance on defense work, and that some

3. The government did not disclose to the engineer the evidence upon which its decision was based or afford him an opportunity to confront and, by cross-examination, test the testimony against him. The Court expressly disclaimed that it was deciding whether this program and procedures could have been adopted by the President and withstand Constitutional scrutiny,[11] and decided only that in the absence of authorization from either the President or Congress it was unlawful to terminate the engineer's job (by revoking his clearance) without affording him the opportunity to confront and cross-examine the witnesses upon whose testimony the government relied.

The Greene decision, while expressly declining to address the Constitutional issues, has been understood to strongly intimate views on two due process issues.[12] First, the Court recognized that the revocation of the engineer's security clearance caused a substantial deprivation. In the Court's own words, the loss was a denial of the "opportunity to follow chosen private profession[ ]" that placed "substantial restraints on employment opportunities" and a "severe limit[ation]" on "work opportunities." The Court was beginning to struggle with defining the kinds of interests whose deprivation would be of Constitutional dimensions.

Second, the Court was clearly troubled by the Constitutionality of procedures that permit such deprivations to occur in the absence of the right of confrontation and cross-examination -- procedural elements the Court described as well-recognized rights and safeguards that are part of our traditional idea of fair procedure. As we detail below, the Court was engaged in its own struggle to define particular procedures that are fundamental to the process due when the government's actions will work a substantial deprivation.

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stigma attached to his loss of the security clearance. 360 U.S. at 491 n. 21.

[11]"Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be." 360 U.S. at 508.

[12]Even at the time of the Greene decision it was understood that the Court had spoken on the very issue it was supposedly not deciding. In his opinion concurring in the result only, Justice Harlan noted: "My unwillingness to subscribe to the Court's opinion is due to the fact that it unnecessarily deals with the very issue it disclaims deciding" * * * "whether the particular procedures here employed to deny clearance on security grounds were constitutionally permissible." 360 U.S. at 509 and 510.

II. THE MEANING OF LIBERTY AND PROPERTY

Prior to its 1972 decision in Board of Regents v. Roth[13] Supreme Court definitions of "liberty" and "property" amounted to taking the words, "life, liberty and property" as a unitary concept embracing all interests valued by sensible men.[14]

It is only in the last fifteen years that the Court has attempted to articulate the nature of the distinct interests encompassed by the terms "liberty" and "property."

A. Property

Roth involved the claim of a Wisconsin State University professor who was not rehired after the expiration of his initial one year contract of employment. The university gave the professor no reason for the non-renewal of his employment contract, and provided him with no opportunity to contest the decision. The university, however, pursuant to its own rules, provided the professor with advance notice of its decision.[15]

The Wisconsin statute provided that a state university professor is considered to be a tenured "permanent" employee, who may be discharged only for cause, only after four years of continuous service. Therefore, under Wisconsin law, the professor was a "probationary" employee for whom no protection was provided.

Nonetheless, the professor claimed that under the Constitution his "property" interest in continued employment as a teacher triggered due process rights to learn the reasons for his non-renewal and to contest the non-renewal at a hearing. In rejecting the professor's claim, the Court held that the professor had no property interest warranting any Constitutionally mandated process because he had no "legitimate claim of entitlement" to continued employment by the university. The source of such property interest, i.e., such "legitimate claim of entitlement," is not the Constitution itself, but rather is "defined by existing rules or understandings that stem from an independent source such as state law."[16] Those understandings, however, need not be codified in a statute, published administrative regulations or even written down, in order to provide a basis for a "legitimate claim." In a case

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[13]408 U.S. 564 (1972).

[14]Monaghan, Of "Liberty" and "Property", 62 Cornell Law Rev. 405, 409 (1977).

[15]408 U.S. at 567-68.

[16]408 U.S. at 577.

decided the same day as Roth, the Court held that such understandings may be grounded in an "unwritten 'common law,'" demonstrable from the historical practice, and other relevant facts and circumstances.[17]

In applying the Roth test, the Court soon wrestled with the question of whether the "rules or understandings," such as state law, which are to examined to determine whether a "property" interest was thereby created, would also define the procedures due. In other words, would one claiming a property interest have to take the bitter (the procedure specified) with the sweet (the property right to a process).

The issue first found expression two years after the Roth decision in Arnett v. Kennedy,[18] a case involving a discharged federal employee. The case fractured the Court and failed to produce a majority opinion. Although six Justices rejected the plurality opinion's advancement of the "bitter with the sweet" theory of due process, the matter was left in substantial uncertainty for several years.[19] However, the matter appears to have been put to rest by the Court's 1985 decision in Cleveland Board of Education v. Loudermill.[20] That case makes the point in unusually blunt language:

> [T]he "bitter with the sweet" approach misconceives the constitutional guarantee. If clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights --life, liberty and property-- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the

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[17]Perry v. Sindermann, 408 U.S. 593, 600 (1972). Interestingly, in Roth, the professor had argued that the university practice was to renew most of the professors' one year contracts. This, however, was not deemed by the Court to be a "common law" of reemployment giving rise to a right to reasons and a hearing in the event of non-renewal. Roth, 408 U.S. at 578 n. 16.

[18]416 U.S. 134 (1974).

19For example, only two years later, in 1976, four of the Justices would accuse the other five of implicitly endorsing the position that had won the support of only three Justices in Arnett. See Bishop v. Wood, 426 U.S. 341, 350, 353, 355-362 (1976).

[20]470 U.S. 532 (1985).

procedures provided for its deprivation any more than can life or liberty.[21]

Whether or not a federal civilian employee, employee of a government contractor or member of the military has a "property" interest in his position, or in any particular position, depends on whether, based on Federal statutes, Executive Orders, agency regulations or other relevant potential sources, there is a claim of entitlement. Mere status as a government employee, for example, as opposed to an employee of a civilian contractor, is not determinative.

1. Civilian DoD Employees

Civilian employees are afforded different protections against adverse action[22] under the Civil Service Reform Act of 1978 ("CSRA"), depending on their classification, e.g., probationary or non-probationary; preference eligible (including veterans) or non-preference eligible; competitive service or excepted service. Whether a particular employee is within any particular category is dependent not only on the categories established by the CSRA, but the application of those categories under regulations issued by the Office of Personnel Management ("OPM"). See generally, Harrison v. Bowen, No. 86-5168 (D.C. Cir. April 3, 1987) Slip op. at 19-20 and n. 22.

Some civilian employees are afforded substantive protections by the CSRA, e.g., adverse action may be taken against members of the competitive service "only for such cause as will promote the efficiency of the service" under 5 U.S.C. §7512 or when the agency head considers suspension or dismissal "necessary in the interests

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[21] 470 U.S. at ___, 105 S. Ct. at 1493.

[22] We use the term adverse action generically to encompass the range of actions for which the CSRA provides protection, including, for example, removal, suspension for more than 14 days, reduction in grade, or reduction in pay. See 5 U.S.C. §7512. We do not thereby make a value judgment, for Constitutional purposes or otherwise, whether other actions for which the CSRA provides no protection would be sufficiently grievous to cause a deprivation of a liberty or other nonproperty interest. The focus of the property interest analysis is only upon those entitlements, such as the right not to be demoted without a finding of "cause" that is recognized by law, regulation or common law historical practice.

of national security" under 5 U.S.C. §7532.[23] A Section 7512 dismissal is reviewable by the Merit Systems Protection Board, even if the basis for the dismissal was the revocation of a clearance. See Egan v. Department of the Navy, 802 F.2d 1563 (Fed. Cir. 1986), cert. granted, 55, U.S.L.W. 3789 (May 26, 1987) (No. 86-1552). Alternatively, a Section 7532 dismissal, which is based on "national security" grounds and is only applicable to sensitive positions,[24] provides certain procedural protections, but is not reviewable by MSPB. Id.

Additionally, some civilian employees, e.g., probationary employees, are afforded no substantive rights by the CSRA, and, therefore, have no property interest in their employment. The property rights of other civilian employees are the subject of some debate, e.g., members of the excepted service (e.g., most attorneys).[25]

Therefore, it is not possible to draw any generalized conclusion with respect to the DoD civilian employees' property interests in their jobs; it depends on their classification and the

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[23]Of course, more specific statutes may limit the protections that otherwise would be applicable under the CSRA. For example, in enacting Section 102(c) of the National Security Act, 50 U.S.C. #403(c), Congress specifically permitted the Director of the CIA, notwithstanding the CSRA, to terminate officers or employees of the CIA when "necessary or advisable in the interests of the United States." See Doe v. Casey, 796 F.2d 1508, 1511 (D.C. Cir. 1986), cross petitions for cert. filed, 55 U.S.L.W. 3572 (Feb. 6, 1987) (No. 86-1294) and 55 U.S.L.W. 3645 (Mar. 9, 1987) (No. 86-1442). Likewise, the Secretary of DoD may terminate any employee of the National Security Agency when "in the interest of the United States" and when the procedures [Sections 7513 and 7532 of the CSRA] "cannot be invoked consistently with national security. Similar authority is provided for Defense Intelligence Agency employees and civilian intelligence officers and employees of military departments. See 10 U.S.C. §1604(e)(1) and Sections 502 and 504 of the Defense Intelligence Authorization Act for FY 1987.

[24]The term "national security" has been interpreted narrowly, to "comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." Cole v. Young, 351 U.S. 536, 544 (1956) (construing predecessor to Section 7532 that "was substantially identical"). See also Egan, 802 F.2d at 1568.

[25]Compare Doe v. Department of Justice, 753 F.2d 1092, nn. 4 and 8 (D.C. Cir. 1985) with Harrison v. Bowen, No. 86-5168 (D.C. Cir. April 3, 1987) Slip op. at 11, 27-28 and nn. 13, 32 & 33.

substantive protections afforded to them by the CSRA, OPM regulations and the historical common law that may provide an additional basis for claiming entitlement to protection. Accordingly, if DoD were to adopt a uniform procedure applicable to all its civilian. employees, it would be necessary to assume that all such employees have a property interest in employment such that adverse action may not be taken without meeting due process requirements. Of course, DoD would be compelled to provide any additional procedural protections that may be required by the CSRA, agency regulations or otherwise.[26]

2. Civilian Employees of DoD Contractors

Whether a civilian employee of a DoD contractor has a property interest in employment turns on the contractual arrangement between the civilian employee and the contractor. Such an interest would be created if, for example, the employee has a contract with his employer that assures his retention absent cause for discharge. Therefore, such an employee would be entitled to "due process" if government action caused the employer to discharge the employee. The employee would be entitled to an opportunity to contest whether "cause" existed for his discharge. As an illustration, if DoD requires that all contractor employees receive and maintain a security clearance, an employee that may be discharged only for cause could contest a dismissal based on the denial or revocation of a security clearance. See e.g., Stein v. Board of City of New York, 792 F.2d 13 (2d Cir. 1986); See also, Greene v. McElroy, supra. That private contracts can create property interest was recently reaffirmed by the Supreme Court in Brock v. Roadway Express, Inc., 107 S. Ct. 1740 (1987).[27]

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[26]Congress of course may exceed due process requirements in establishing procedural protections; so may an agency. Naturally, the agency is obligated to provide those additional protections mandated by Congress. In addition, the agency is obligated to follow its own rules, even if such rules provide purely discretionary additional protections. See e.g., Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957).

[27]In Brock the Court considered the due process rights of a private employer who is ordered by the Secretary of Labor to reinstate a discharged employee upon a finding that the discharge may have violated the Surface Transportation Assistance Act of 1982 (which, among other things, protects employees from retaliation arising from the reporting of safety violations). No member of the Court even questioned the Secretary's concession that the employer's private contractual right to discharge employees for cause constituted a property interest protected by the Due Process Clause.

On the other hand, some employees of civilian contractors may have no contractual rights at all, and no historical "common law" practice of retention absent a basis for discharge. In those cases, such employees of contractors would have no property interest in their employment. As a result, a discharge, even if caused by governmental action, would not implicate a property interest.

However, DoD will not necessarily know (or be able to reasonably discover much less control) the range of private contractual relationships between government contractors and their employees. Some employees may be unionized, such that a collective bargaining agreement may establish rights against discharge, demotion or other adverse action. Other government contractors may enter into separate contracts with their employees on a individualized basis. Each contract would set forth the rights of the parties, and the protections, if any, against discharge or other adverse action. Finally, even in the absence of formal contracts, many private sector employers rely on employee handbooks and other guides which discuss the circumstances under which adverse action can be taken. Handbooks and other evidence of practice would be sufficient in many cases to establish a bona fide claim of entitlement that would translate into a property interest protected against government deprivation by the Due Process Clause.

3. Military Personnel

There is a complex web of statutory and regulatory provisions that govern discharges from the various branches of the armed services. The variety of procedural rights accorded members of the military does not lend itself to a generalization about the procedural rights accorded by Congress and the service branches themselves. However, it does appear that notwithstanding a panoply of procedural protections, the services of members of the uniformed services may be terminated at any time, if the discharge is honorable. Therefore, although members of the armed forces have various protections against discharges that may be considered punitive or stigmatizing, they apparently have no property interest in continued service.

4. Property Interest in Security Clearance

We do not discuss separately the question of a "property" right to a security clearance. We are aware of no case that has distinguished for purposes of analysis of "property" interests, between the "clearance" and the underlying employment opportunity to which the clearance attaches. For one needs to be in a position to avail oneself of the access that the clearance provides. Unless and until the position is attainable the clearance issue is

somewhat academic. For example, we doubt that the Supreme Court would have considered the question of a citizen's property interest in his driver's license if the government had the untrammeled right to deny access to vehicles.

Therefore, for example, if a probationary employee were dismissed for failure to receive a security clearance within the period of his probation, we doubt that a property interest infringement claim could be successfully made. The point is that the employee could be dismissed at any time during the period of his probation for any reason (aside from an illegal or unconstitutional reason, e.g., because he was black). If that is true, no real value could be attributed to a clearance that could have no practical application. We are aware of no case in which a claim has been made that the denial of a clearance, apart from the position to which the clearance was attached, constituted a loss of a property right. Just as an employee with no property right in his job would have difficulty making out a property interest claim based on the denial or revocation of a clearance, if the denial or revocation has no effect on the job itself, it would be difficult to establish any loss of any property interest.

B. Liberty

The Court's treatment of the "liberty" interest has been often confused, if not contradictory. As noted above, it was not until the 1970's that the Court began to separate out the component parts of the interests protected by the Due Process Clause, i.e., "life, liberty and property." However, prior to that time the Court had given recognition to the individual right to protection from government interference with his ability to follow a chosen profession and pursue economic opportunity, particularly where that interference has its origins in branding the person disloyal.

In Greene v. McElroy, the Court not only expressed concern with Mr. Greene's loss of employment but also focused on the effects of the loss of his security clearance on his "opportunity to follow chosen private profession[and the resulting "substantial restraints on employment opportunities." Because most employers of aeronautical engineers are defense contractors whose employees must have clearances, Mr. Greene was effectively barred from pursuing his profession.

This is to be contrasted with the facts of Cafeteria & Restaurant Workers Union Local 473 v. McElroy,[28] decided only two years later. Cafeteria Workers also involved the loss of a

[28]367 U.S. 886 (1961).

security clearance by an employee of a government contractor.[29] Unlike Greene, however, the Court did not find unlawful a system whereby such an employee could be summarily barred from entrance to a naval installation, without the benefit of notice or a hearing.[30] The employee in Cafeteria Workers was a short order cook whose employer ran a cafeteria at a Naval gun factory. The factory's security officer withdrew her security badge on the grounds that she failed to meet the factory's security requirements. Here the loss of the security badge did not affect the employee's ability to pursue her trade, for she was reassigned to another location. Moreover, the Court found that no badge of disloyalty or infamy was associated with that action. Indeed, the government had expressly represented that it would not "'by law or in fact'" prevent [her] from obtaining employment on any other federal property."[31] Thus, the employee's opportunities to work for her current employer or any other employer, within or without the federal government, remained unaffected.[32] The only interest affected was her interest in working at the particular Naval gun factory.

A watershed decision in the Court's analysis of the scope of the liberty interest was Wisconsin v. Constantineau[33] which involved the practice of "posting," whereby persons were labeled as excessive drinkers, and as a result of being posted could not be lawfully sold liquor. In oft-quoted language, the Court held:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be .heard are essential.[34]

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[29]As we discuss, there the similarity ends. If Greene is the rule, surely Cafeteria Workers is the exception to it.

[30]In contrast to Greene, the Court in Cafeteria Workers found that the program of clearing access to the Naval installation was authorized by law. Therefore, the Court was compelled to reach the arguments that such a program ran afoul of the procedural protections required under the Due Process Clause.

[31]367 U.S. at 899 n.10.

[32]She "remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her present employer] or with any other employer." 367 U.S. at 896, quoted in, Stein v. Board of City of New York, 792 F.2d 13, 16 n.2 (2d Cir. 1986).

[33]400 U.S. 433 (1971).

[34]400 U.S. at 437.

Thus, in Roth, the Court found the university professor's liberty interests undeprived because in failing to renew his one year contract the university had not "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,"[35] but in Goss v. Lopez,[36] the Court found due process protections triggered by a school's suspension of a student based on charges of misconduct.

The scope of the liberty interest recognized in Constantineau was refined in the Court's 1976 decision in Paul v. Davis.[37] Paul v. Davis concerned the police distribution to merchants of a flyer picturing and naming persons that were "active shoplifters." Mr. Davis was pictured and named on the flyer; and although Mr. Davis had been arrested for shoplifting, the charges had been dismissed. The Court held, contrary to any other impression which may have been gleaned from Constantineau, "the interest in reputation alone" is not embraced by the concept of liberty protected by the Due Process Clause.[38] Under the Paul v. Davis rationale, the government must at the same time be doing something more, e.g., depriving one of employment, as in Roth, or the right to go to school, as in Goss.

Paul v. Davis made clear that in order to establish a liberty interest protected by the Due Process Clause something more than a mere interest in reputation was required. What would satisfy that "something more" requirement was, however, not clear. There is language in the opinion suggesting that the "something more" required is the governmental alteration or extinguishment of a status or right recognized by state law.[39] However, there is also language in the opinion suggesting merely that defamation is only

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[35]Roth, 408 U.S. at 573. Nor did the "[university], in declining to rehire the [professor], did not make any charge against him that might seriously damage his standing and associations in his community."

[36]419 U.S. 565 (1975).

[37]424 U.S. 693 (1976).

[38]424 U.S. at 711. Since Greene and Cafeteria Workers, the Court's analysis of the liberty interest protected by the Due Process Clause has been sufficiently "bumpy" and uncertain to raise the question of whether the Court has been true to its precedent or has seized on factual distinctions that ought not make a difference.

[39]424 U.S. at 711.

actionable when it causes injury "because of what the government is doing to him [aside from defaming him]."[40]

1. Liberty Interests in Employment

In the area of government employment, it now appears settled that liberty interests may be implicated even if the employee has no independent property interest in such employment. Therefore, the "something more" would include the loss of government employment or a foreclosure of future government employment opportunities irrespective of whether the employee could also raise an independent property interest claim.[41] For example, in Owen v. City of Independence, the Court held that defamatory and stigmatizing charges occurring in the course of the termination of employment was a deprivation of a liberty interest protected by the Due Process Clause, even in the absence of any property interest in continued employment.[42] Likewise, in Codd v. Velger, in the absence of any property right to continued employment, the Court analyzed the purpose of the hearing right for persons claiming a discharge was stigmatizing.[43]

The government must do something more than commit slander or libel. The "something more" could include a spectrum of actions, from a refusal to hire, failure to promote, loss of rank or pay, or other similar unfavorable administrative action, including the denial or revocation of a security clearance.[44] For purposes of

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[40]424 U.S. at 708, quoting, Constantineau, 400 U.S. at 437.

[41]Such a result is consistent with the earlier cases and the Court's landmark 1972 decision in Roth (where the Court recognized a liberty interest in a stigmatizing non-renewal of a one year contract, although the professor had no property interest in the contract's renewal). However, some confusion caused by Paul v. Davis has been difficult to eliminate. See, e.g., Doe v.Department of Justice, 753 F.2d 1092, 1119, 11221128 (D.C. Cir 1985) (MacKinnon, dissenting) (suggesting that liberty interests are products of statutes or other mutual understandings, just as property interests are created).

[42]445 U.S. 622, 631 and n.10 (1980).

[43]429 U.S. 624 (1977). As we discuss at pages 40-42, infra, Codd is a key case in defining the purpose of the "name clearing" hearing that is required.

[44]We assume it a rare circumstance that a security clearance will be denied or revoked with no immediate impact on current employment, i.e., without some accompanying adverse action. It is alternatively assumed that the denial or revocation of a security

this discussion we think the DoD definition of "unfavorable administrative action,"[45] is instructive and assume it would always satisfy, the "something more" required by Paul v. Davis.

There are essentially two kinds of actions that can trigger a liberty interest deprivation. While slander or libel by the government is in and of itself inadequate, such reputational damage will trigger due process protections where the government is at the same time adversely affecting current or future employment opportunities. That is, where the government is taking "adverse action," i.e., action adverse to current status (demotion, dismissal, loss of rank or pay) or where what the government is doing will effectively foreclose future government opportunities. Doe v. Department of Justice, 753 F.2d at 1111; Mosrie v. Barry at 1161 ("so severely impaired one's ability to take advantage of a legal right, such as a right to be considered for government contracts or employment or a right to seek nongovernment employment, that the government can be said to have 'foreclosed' one's ability to take advantage of it and thus extinguished the right") (footnote omitted).[46]

Effective foreclosure of future employment opportunities may be shown simply by demonstrating that the employee will not be considered for "employment on a basis equal with others of equivalent skill and experience -- i.e., that he was wrongfully denied the 'right to be considered for government [employment] in common with all other persons." Bartel v. FAA, 725 F.2d 1403, 1415 (D.C. Cir. 1984), quoting Mosrie, 718 F.2d at 1161.

The second essential element to a claim of a liberty interest deprivation is some dissemination (or potential therefor) of

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clearance, unless undisclosed, would be an effective bar against at least future employment opportunities that require such clearance. See discussion at pages 31-37. What is to be distinguished is action that is no more than pure government libel, e.g., in the absence of a security clearance determination, or any other agency action, the issuance of publicity that an employee is disloyal, unethical, a communist, untrustworthy, etc.

[45]DoD Directive 5200.2-R, proposed Section 154.3(cc), 52 Fed. Reg. 11219, 11221 (April 8, 1987).

[46]It may very well be that some personnel decisions cause a change, e.g., a transfer with no loss in pay or grade, but no substantial impact on current or future employment opportunities. See Mosrie v. Barry, 718 F.2d 1151, 1161 (D.C. Cir. 1983) (defamation accompanying a lateral transfer of a police captain did not give rise to a due process remedy). But the key is that either an impact on current employment or future employment opportunities may satisfy the "something more" requirement.

material or information that is harmful to reputation or damaging to future employment opportunities. This involves two separate questions: Is the information harmful or damaging, and was it (or will it be) disseminated in a manner that is likely to cause damage. We examine the second question first.

It is clear that some disclosure is an essential element of a claim of injury to reputation or future employment opportunity. Therefore, due process remedies are not triggered by the private oral transmission of damaging information to the discharged employee but to no others.[47] However, it is equally clear that widespread and public dissemination is not required in order to cause a deprivation of liberty interests. Liberty interests will be implicated if the information is communicated to other agencies within the government, or if the information is in a file available to prospective employers or other government officials. For example, DoD Directive 5200.2-R (proposed section 154.67(d), 52 Fed. Reg. at 11240) while recognizing the "sensitive" nature of security determination information, permits access to other officials in the government with a need for such information. Such availability, is adequate "disclosure" for a loss of liberty interests.[48]

This is the case because the courts have recognized that government is not a monolith, but is instead composed of many agencies and departments. Thus, one agency or department's determination could, if shared with or accessible to other departments and agencies, effectively bar the person from further work with the federal government. E.g. Egan, 802 F.2d at 1573 (final adverse personnel security actions based on Defense Investigative Service ("DIS") investigations reported to DIS for recording in the Defense Central Index of Investigations, made available to OPM and other agencies upon request, and used if clearance is sought in the private sector under Defense Industrial Personnel Security Clearance Program); Conset Corp. v. Community Services Administration, 655 F.2d 1291, 1297 (D.C. Cir. 1981) (allegation of conflict of interest has circulated "to other governmental agencies and ... was instrumental in preventing Conset from being awarded other government co#tracts."); Old Dominion

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[47]Bishop v. Wood, 426 U.S. 341 (1976). It is only important that the information be transmitted in connection with the employee's termination; it is not essential that the transmission occur before the termination. See Owen v. City of Independence, 445 U.S. 622 (1980).

[48]48/ See Doe v. Department of Justice, 753 F.2d at 1113 n. 24 ("The 'public disclosure' requirement would also be satisfied if the Department placed Doe's termination memorandum in her personnel file and made that file available, even on a limited basis, to prospective employers or governmental officials.").

Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980) (information communicated through government channels and would likely be recommunicated whenever contractor bid for a federal contract); Larry v. Lawler, 605 F.2d 954, 958 (7th Cir. 1978) (stigmatization throughout the entire federal government). But see Perry v. FBI, 781 F.2d 1294, 1299-1303 (7th Cir. 1986) (en banc), (cert. denied, ___ U.S. ___, 107 S. Ct. 67 (1986) (adverse information not distributed government-wide, each enforcement agency was free to conduct its own review, determination that not suitable limited to one specific position in one agency); Nesmith v. Fulton, 615 F.2d 196, 200 n. 6 (5th Cir. 1980)(information maintained in a private file).

It is no answer that other employment opportunities, either in another profession or in the private sector, are not adversely affected. As Justice Jackson aptly noted:

> To be deprived not only of present government employment but of future opportunity for it is no small injury when government employment so dominates the field of opportunity.[49]

There of course must be some damaging information. Therefore, where an employee is simply not rehired and there is no adverse information, the courts have assumed that he "remains as free as before to seek another" position.[50] A bare discharge would not implicate liberty interests, even though such a discharge (or non-renewal) might make a person less attractive to some other employer.[51] The central question is describing generically the

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[49]Joint Anti-Fascist Refugee Committee V. McGrath, 341 U.S. 123, 185 (195!)(Jackson, concurring). Justice Jackson went on to comment:

> The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally. Id.

[50]Roth, 408 U.S. at 575.

[51]Compare Roth at n. 13 with Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977); Carducci v. Regan, 714 F.2d 171, 176 n.5 (D. Cir. 1983) and Harrison v. Bowen, No. 86-5168 (D.C. Cir., April 3, 1987).

Apparently, even performance-based reasons for discharge may not constitute the sort of "opprobrium" sufficient to constitute a liberty deprivation. Harrison, Slip op. at 27. On the other hand, it has also been observed that, as a practical fact of life, termination from government employment for cause is a badge of dishonor that carries with it a stigma that makes any future employment very difficult. See Arnett v. Kennedy, 416 U.S. at 213-

circumstances under which an "unfavorable administrative action" will implicate liberty interests.

2. The Denial or Revocation of a Security Clearance.

Virtually by definition, the denial or revocation of a clearance would appear to be sufficiently stigmatizing, for it focuses directly on an innate characteristic of the person - a matter he has little ability to alter.[52] The court in Harrison may have articulated the difference between such judgments and other evaluations which do not implicate liberty interests:

> The former characteristics imply an inherent or at least a persistent personal condition, which both the general public and a potential future employer are likely to want to avoid. Inadequate job performance, in contrast, suggests a situational rather than an intrinsic difficulty; as part of one's biography it invites inquiry, not prejudgment.

Harrison v. Bowen, No. 86-5168 (D.C. Cir., April 3, 1987) Slip op. at 27.

For example, it appears that, by its terms, in adopting Executive Order 10450, the President's focus was to assure that civilian employees are "reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States" such that their employment "is clearly consistent with the interest of national security." Accordingly, the Supreme Court, in Cole v. Young, construed the term "national security" [53] narrowly in part due to the "stigma attached to persons dismissed on loyalty grounds." 351 U.S. at 546. The Court viewed the purpose of the Executive Order, and the parallel provisions of the 1950 amendment

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14 (Marshall, dissenting), quoting, Merrill, Report in Support of Recommendation 72-8, Procedures for Adverse Actions Against Federal Employees (1972).

[52]For purposes of our analysis we focus on the grant, denial or revocation of security clearances that attach to people. Not addressed here are issues concerning which job positions or tasks require access to classified material.

[53]The term "national security," as that term is used in Executive Order 10450 (and Section 7532, the current version of the Veterans Preference Act) has been interpreted by the Supreme Court to cover activities concerned with the protection of the nation from internal subversion or foreign aggression, and not those activities that contribute to the national strength through the impact on the general welfare. See Cole v. Young, 351 U.S. 536, 542-44 (1956).

to the Veterans Preference Act, and concluded that the summary suspension and unreviewable dismissals contemplated were limited to "loyalty" determinations for employees in sensitive positions.

Where the government denies a security clearance or discharges an employee revealing a stigmatizing basis, then it is clear that liberty interests are implicated. A liberty claim could be made out if the government were to deny clearance for a specified ground that was either stigmatizing or would foreclose other employment opportunities. For example, in Doe v. Casey, the court found that a liberty claim could be made out by a CIA employee discharged because his homosexuality presented a security risk. Although the employee did not consider it stigmatizing that he should be labeled a homosexual, he claimed that it was stigmatizing for the government to assert that his homosexuality posed a security risk. The court reasoned that the CIA's action of denying clearance for such reasons would label the employee unsuitable for government work wherever a clearance was required. 796 F.2d at 1523 and n. 67.

On the other hand, one court has held that the denial of a "top secret" clearance on unspecified grounds is not stigmatizing because it does not imply disloyalty of the applicant.

> To receive a "top secret" clearance is assuredly a badge of loyalty; but to be denied it on unspecified grounds in no way implies disloyalty or any other repugnant characteristic -- as is shown by the evidence in this case that the mere fact that one has relatives in a hostile country may be considered a basis for denial.

Molerio v. FBI, 749 F.2d 815, 824 (D.C. Cir. 1984) (emphasis added). The Molerio court's view of the impact, however, might be different in another case. For in Molerio, the person denied the "top secret" clearance already had a "secret clearance," and there was no evidence that the denial of the "top secret" clearance had any adverse impact. In fact, Molerio thrived professionally after the denial.[54]

It is difficult to square fully Doe v. Casey with Molerio v. FBI and apply their reasoning with equal force to the following hypothetical. Joe Smith works as an aerospace engineer at Dynamic General, a major defense contractor. In the past, Dynamic General had compartmentalized its work force, dividing it between those that worked on classified projects and those that worked on non-classified government projects and civilian projects. The

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[54]Molerio was actually reassigned to a higher grade position with greater opportunity for career advancement within the Immigration and Naturalization Service after the FBI refused to hire him.

Department of Defense, however, has issued new regulations in light of security breaches at the facilities of major defense contractors. The new requirements forbid contractor use of any non-cleared personnel in the same facility where security work is performed. Thus, Dynamic General had to choose whether to separate its sensitive and non-sensitive work or use only cleared personnel at its facility.

Joe Smith is denied a clearance for unspecified and unpublished grounds. Under the reasoning of Molerio he is not necessarily stigmatized. But in fact, Smith is out of a job at Dynamic General. When he applies for a job at WRT, another contractor, the first question will be whether he has ever been denied a clearance. As a result, Smith effectively will be barred from being employed as an aerospace engineer in the United States, for virtually every major concern is a defense contractor. In fact, this fact pattern is strikingly familiar to Greene v. McElroy, where the Court found that Mr. Greene was effectively barred from pursuing his profession. What the Molerio court failed to appreciate is the practical impact of being denied clearance or having clearance revoked, and to separate out the two bases upon which a liberty claim may be based: injury to reputation or the foreclosure of economic opportunity. The courts have apparently assumed that greater injury results if the reason for the denial or revocation is known. but, if the reason is known, and a "hearing" is provided, there is an opportunity to clear one's name, by setting the record straight. Presumably, whatever stigma there is can be washed away through the hearing process.

The Molerio court's reasoning simply fails because the absence of a disclosed stigmatizing reason does not mean that there is no likelihood of harm. What agency would second guess a CIA or DOD determination to deny or revoke clearance, even if no reason were provided for the decision? As the Doe court acknowledged:

> As a practical matter, Doe will be unable to obtain employment whenever a security clearance is required.
>
> * * *
>
> While it may be true that other agencies and private employers will make their own determination of Doe's security risk, as a practical matter, we find it inconceivable that other agencies would second-guess such a determination by the CIA.

Doe v. Casey, 796 F.2d at 1523 and n.67.

The answer lies in three unique facts in Molerio.

1. The court did not consider the denial of a top secret clearance to be a badge of disloyalty, but the person denied already had a "secret" clearance. The court simply did not address whether the denial or revocation of any clearance at any level

would be stigmatizing. Indeed, by the terms of Executive Order 10450, the denial or revocation of an initial clearance would indicate disloyalty.

2. In most cases the reason for the denial or discharge will be disclosed. Hoska v. Department of the Army, 677 F.2d 131, 136-38 (D.C. Cir. 1983) and similar cases, which require a "rational nexus" between security responsibilities and the disqualifying factor a fortiori require the existence of a reason for the denial or revocation of a clearance leading to adverse action under the CSRA. Only compelling national security reasons will bar disclosure to the individual, as apparently was the case in Molerio. If the information is not disclosed to the individual, there is little purpose to a "name-clearing" hearing anyway; it is impossible to refute charges not disclosed to you.

3. The Molerio court, however, knew the reason for the denial of the clearance and apparently did not consider it stigmatizing. The court hinted liberally that the real reason for the denial had nothing to do with the qualifications or suitability of the candidate himself, but disqualifying facts relating to his relatives.[55]

In the vast majority of cases, there will be a reason for the denial or revocation of a security clearance (which must meet the "rational nexus" requirement see Hoska v. Department of the Army, 677 F.2d 131, 136-138 (D.C. Cir. 1982) (and cases cited therein)), which will be disclosed to the individual, and which will be placed in a file available within the government for review if the individual seeks future clearance. While it may be true in some cases that a denial might not cause any injury to future or current employment (as was the case in Molerio and the short order cook in Cafeteria Workers), it is true that these cases illustrate the exception rather than the rule.

Typically, the denial or revocation of a security clearance, is, as a practical matter, a statement that at least "impl[ies] an inherent or at least a persistent personal condition, which both the general public and a potential future employer are likely to want to avoid[;] as part of one's biography it invites ... prejudgment." Harrison at 27. While there might be unusual circumstances where there is no such impact, it is simply not possible to know when such exceptional circumstances will arise.

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[55]In this fashion the denial was based on a class based value judgment that purported to have nothing to do with the individual characteristics or qualifications of the employee. In this respect, the Molerio rationale finds support in Doe v. Casey, insofar as the court acknowledged that Doe's rights would not be impacted if the dismissal were based on a CIA policy to dismiss all homosexuals.

Accordingly, in the absence of a case by case determination, it must be assumed that such adverse impact will indeed be caused.

III. THE DUE PROCESS HEARING REQUIREMENT

Once it is determined that a liberty or property interest is implicated, the question becomes what process is due. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The essence of the hearing requirement is an opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965), quoted in, Brock v. Roadway Express, Inc., ____ U.S. at ____, 107 S. Ct. at 1747. Although the cases are unanimous that advance notice and some kind of a hearing are essential in all circumstances, the cases focus on a series of factors to flesh out the timing and nature of the hearing required.

There are no fixed rules governing the due process hearing; there are simply too many variables that are a part of the determination of what is fair under the circumstances. Most analyses involve the application of the three broad criteria adopted by the Court in Mathews v. Eldridge:

> 1. "the private interest that will be affected by the official action"
>
> 2. "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" and
>
> 3. "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[56]

In weighing the Mathews criteria, the courts most typically examine pre-existing procedures and determine whether they meet the requirements of due process. Rarely do courts legislate particular requirements that must be present in all circumstances. Of course, even where the courts have appeared to prescribe certain procedures, it is important to understand that such determinations are based on the totality of circumstances and competing interests in each case. While the courts give indications of how they might rule in similar circumstances, each case presents its own unique facts. As the Court first noted in Cafeteria Workers:

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.0[57]

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[56]424 U.S. 319, 334-35 (1976).

[57]367 U.S. at 895, quoted in, Arnett v. Kennedy, 416 U.S. at 155.

Therefore, what is "fair" and what procedures are "due" depends on a variety of circumstances. For example, what may be minimally required is likely to be different depending on the nature of the private and public interests involved, ranging across the board -- from a driver's interest in a motor vehicle license to a school administrator's interest in disciplinary actions for school students. In the absence of a clear blueprint, an evaluation of whether a given set of hearing procedures meet due process requirements in a particular case will depend on an array of factors, and the adequacy of any particular procedural feature may depend on the existence or lack of companion features.

In our analysis we do not evaluate and compare each of the particular procedural features contained in the various directives or Executive Orders and consider their application in tandem with the potentially applicable statutory procedural requirements imposed by the CSRA (Section 7513 and 7532) or the availability of exceptions thereto (e.g., for intelligence officers and employees, CIA, and NSA).[58] Instead, we focus on the essence of the hearing right, if any, provided, and discuss at length only those procedural rights that are fundamental to the due process hearing, and are the subject of differing treatment in the directives.

A. The Purpose of the Hearing

The adequacy of particular hearing procedures employed must be evaluated initially in light of the purpose of the hearing. Although the Mathews criteria have been applied to property and liberty cases, the liberty hearing and the property hearing serve distinctly different purposes. See, e.g. Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981); Doe v. Department of Justice, 753 F.2d at 1113.[59] The purpose of a hearing where liberty

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[58]As we have noted earlier, irrespective of the procedural rights that are or are not afforded by an Executive Order or by DoD or a component's regulations under an Executive Order, absent a statutory exception, federal civilian employees must be afforded the procedural rights provided for them by Congress in the CSRA. See also n. 23, supra.

[59]Interestingly, the Mathews criteria have tended to be applied in a manner that is more protective of property than liberty interests, even though the liberty interest implicated by reputational injury and the foreclosure of employment opportunities would appear "more precious than property itself." Peters v. Hobby, 349 U.S. 331, 351 (1955) (Douglas, concurring). See also Lassiter v. Department of Social Services, 452 U.S. 18, 59-60 (1981) (Stevens dissenting) (suggesting that the Mathews standard be used only in cases of a loss of property, which is less worthy of protection than liberty).

interests are implicated is "an opportunity to refute the charges * * * to clear his name." [60] Unless there is an independent property interest implicated, the underlying decision is not at issue in a "liberty" hearing; rather it is the accuracy of the "stigmatizing" information which damages the person's reputation or his ability to seek other employment opportunities. Therefore, even if the person has cleared his name at a "liberty" hearing, "his employer, of course, may remain free to deny him future employment for other reasons."[61]

This is to be contrasted with the purpose of the property hearing, which affords an opportunity to challenge the underlying substantive decision. It is important to recall that a property interest is created by understandings, e.g., statutes, regulations, contracts, and common law practice, that provide a basis for a legitimate claim of entitlement. The purpose of a property hearing is to provide an opportunity to contest the substantive decision, i.e., to test the claim of entitlement, thereby making it possible to avoid the deprivation of the property interest involved.

B. Timing of the Hearing

In the context of the interest in continued employment (as opposed to other property interests), it appears clear that a full evidentiary hearing is not required before the employee is removed from the position. See Loudermill and Arnett v. Kennedy. What is initially required prior to the deprivation is notice of both the charges and the substance of the relevant supporting evidence, and some meaningful opportunity, short of a full evidentiary hearing, to contest the decision. Id. Thus, while a fuller process may be delayed until later, this predeprivation opportunity is afforded as an "initial check against mistaken decisions." Loudermill, 470 U.S. at 545, quoted in, Brock v. Roadway Express, ___ U.S. at _____, 107 S. Ct. at 1743. This assumes that the employee would want to participate in such a process to avoid any deprivation, and providing such an incentive has been ruled Constitutional. Thus, in Clifford v. Shoultz, 413 F.2d 868 (9th Cir.), cert. denied, 396 U.S. 962 (1969), the court upheld the Screening Board's investigative procedures, and the suspension of clearance pending a hearing in the event of the employee's failure to cooperate.

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[60] Codd v. Velger, 429 U.S. 624, 627 (1977), quoting, Roth, 408 U.S. at 573 and n. 12. Since Codd v. Velger, the liberty hearing is often referred to as a "Codd" or "name clearing" hearing.

[61] Roth, 408 U.S. at n. 12. "[T]he issue in the Codd hearing will be the veracity of the [employer's] charges, not the propriety of the discharge itself." Doe v. Department of Justice, 753 F.2d at 1114 (footnote omitted).

Likewise, where liberty interests have been implicated, the courts have not required a full hearing prior to the proposed deprivation. See Arnett v. Kennedy.[62] Indeed, in the employment "liberty" cases, the hearing's description as a "name clearing" hearing suggests, almost by definition, that it will occur after the dissemination of the damaging information, or at least after the information is placed in a file to which government employers or contracting officials would have access. This is not surprising, because, as discussed, whether a liberty interest will be implicated depends, in part, on the nature of the information disclosed concerning the underlying substantive decision. For example, a government worker may be discharged for a variety of reasons. Whether the basis will be stigmatizing such that due process rights are implicated may not be known in advance - given the myriad potential bases for such a decision, and the various possible reasons and explanations.[63] Moreover, except where the government has a clear and consistent policy concerning the disclosure of information concerning such governmental actions, it will be difficult to know whether any disclosure will occur. As a result, the "liberty" cases have focused not on when a hearing should have been provided, but whether, under the facts of the case, the Paul v. Davis test is met such that a hearing must be provided at all. Invariably, that inquiry is made after the fact and the courts have not focused on the right to a hearing beforehand.[64]

However, where it is relatively clear that a range of actions will be taken and that those actions will result in the disclosure of stigmatizing information, there is no sound basis not to provide the "name clearing" hearing before the disclosure of reputation damaging information. There is certainly no governmental interest in publishing or disseminating the liberty impacting information prior to the hearing that must be accorded. For the governmental interest is adequately served by being able to carry out the underlying action (e.g., suspension of employment or suspension of

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[62]416 U.S. 134, 157-58, 171 n.6 (1974).

[63]In contrast, certain categories of persons have property interests in continued employment, irrespective of the employer's basis for seeking dismissal.

[64]We say this notwithstanding the overly broad language appearing in many "property" cases that "a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Board of Education v. Loudermill, 470 U.S. at ____, 105 S. Ct. at 1493, quoting, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added).

access to confidential information).[65] Indeed it could be argued that the "name clearing" hearing process is a weak and insufficient substitute for a process by which the individual can clear his name of any erroneous charges before the government, with its imprimatur, disseminates that erroneous charge. A retraction of such charges would not only be embarrassing for the government, but, as a practical matter, inadequate to repair the damage. In another context the Court has fully recognized:

> While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Loudermill, 470 U.S. at 105 S. Ct. at 1494, quoted in, Brock, 55 U.S.L.W. at 4533.

In the security clearance arena, the government's principal timing issue is whether its procedures provide an ability to halt continued access to classified information by persons suspected of unreliability. As we have noted, summary action may be taken to suspend access to classified information, see Clifford v. Shoultz, or even to suspend employment. See 5 U.S.C. §7532. However, with respect to both federal personnel and employees of civilian contractors, final security determinations are generally not made until after providing the benefits provided by DOD Directive 5200.2-R or DOD Directive 5220.6, as applicable. See Directive 5200.2-R at Section 154.56(a) and Section 3 of Executive Order 10865.

This timing of procedural rights would appear to comport with the requirements of due process under the Mathews criteria. The government's interest in the prompt suspension of access by those persons suspected of posing a security risk may be taken if the national security interest compels such action. However, procedural protections are provided prior to any final determination concerning such person's clearance (or employment).[66]

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[65]Of course the name clearing hearing has no effect on the underlying personnel decision, and nothing herein should be understood to impinge on the ability of the government promptly to remove an employee from access to confidential information.

[66]This assumes, however, that the injury caused by suspension of access or employment (and any concomitant distribution or availability of stigmatizing information concerning# such suspension) is relatively short lived and that hearing rights are provided in a timely fashion. Excessive delays in the provision of such rights can at some point be considered to constitute a constructively denial. See Brock v. Roadway Express, _____ U.S. at _____, 107 S. Ct. at 1751-52 (Brennan, concurring in part and

C. Notice

In order to have a meaningful opportunity to be heard at any hearing afforded, due process requires that the person be given notice reciting the charges against him[67] or, in the context of the denial or revocation of clearance, the basis for that decision.

The proper question is not whether comprehensive notice should be provided but to identify those exceptional circumstances where the notice requirement may be relaxed due to considerations of national security. We assume that due process does not demand that the government choose between either permitting access to classified bases for a security clearance denial or revocation, or not being able to deny or revoke that clearance. Current DoD procedures generally recognize the importance of the notice requirement, but approach differently the content of the notice and the circumstances in which the normal notice might not be provided.

Prior to any final personnel security determination resulting in an unfavorable administrative action, military and civilian employees must be given "a written statement of the reasons why the unfavorable administrative action is being taken . . . [that] shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the Privacy Act of 1974 (5 U.S.C. #552a) and national security permit." See Directive 5200.2-R at Section 154.56(b)(1).[68] Similarly, prior to denial or revocation

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dissenting in part), and at 1753-56 (Stevens, dissenting in part) ("routine and unjustified delay" between preliminary and final decisions).

[67]See, e.g., Doe v. Casey, 796 F.2d 1508, 1524 (D.C. Cir. 1986); Doe v. Department of Justice, 753 F.2d 1092, 1112, (D.C. Cir. 1985) ("Due process requires that an individual be given notice before a hearing if there is to be a meaningful opportunity to respond") (emphasis in original); Campbell v. Pierce County, 741 F.2d 1342, 1345 (11th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

[68]It is our understanding that some have suggested that the notice requirement be made inapplicable to applicants for employment who are denied clearances. This would be an unwise change of dubious Constitutionality. While an applicant for federal employment has no right to a position, the denial of employment can, as we have discussed, cause a liberty interest deprivation when accompanied by stigmatizing adverse information. While the question of stigma often arises in the context of dismissal, liberty interests triggering due process protections can also arise in the context of an application for employment. See ##### v. FBI, 781 F.2d 1294, 1300 (7th Cir. 1986)(en banc) cert. denied, ___ U.S. ___ 107 S. Ct. 67 (1986).

of a clearance, DoD contractor personnel must be provided "a written Statement of Reasons . . . [that] shall be as detailed and comprehensive as the national security permits." The Statement of Reasons is to be accompanied by a "letter of instructions" explaining that the individual may request to have a hearing conducted after answering the Statement of Reasons, and explaining the consequences for failure to respond to the Statement of Reasons within the prescribed time frame (i.e., processing of the case will be discontinued, the requested clearance will be denied, and any clearance held will be administratively suspended). See Directive 5220.6 at Section 155.7(c).

In contrast, by the express terms of the governing Directive, the proceedings of an NSA Board of Appraisal to determine clearance eligibility of an NSA employee or a person assigned or detailed to NSA "shall not include notice to the individual" and the report submitted with the recommendation to the NSA Director "shall not be made available to the person." Directive 5210.45 at Section IV.C. However, where an NSA employee faces suspension or termination pursuant to 5 U.S.C. #7532, the employee would be entitled to a written statement of the charges "stated as specifically as security considerations permit" before removal. Termination, however, may occur under 50 U.S.C. #833 without such notice if the Secretary determines that the procedures under Section 7532 "cannot be invoked consistently with the national security." With respect the denial or revocation of SCI access, an employee may be "provided the reasons for such denial or revocation" only when "the Determination Authority, in the exercise of his discretion, deems such action in any given case to be clearly consistent with the interests of the national security." See DCID 1/14, Annex B at Section 4a (1) and (2).

Meaningful notice to the individual of the reasons for denial or revocation of a security clearance is an essential element of due process. Its availability cannot, therefore, be subject to the discretion of agency officials as a general rule (the problem in cases involving NSA personnel or SCI access), or as a matter of "exception" under standards so broad and vague as to supply no basis for determining whether its preclusion in a given case is justified.

Moreover, for notice to be "meaningful," it must include not only notice of the allegations, but notice of "the substance of the relevant ,supporting evidence." Brock v. Roadway Express, __ U.S. at _____, 107 S. Ct. at 1743. It will not due for the government to withhold the true basis for its decisions, for whatever else is due process requires, "the element of knowing, and therefore having an opportunity to refute all of the evidence on the basis of which the harmful action is taken, is a fairly rudimentary one." Carducci v. Regan, 714 F.2d 171, 176 (D.C. Cir.

1983)(per Scalia).[69] The directives governing DoD military and civilian employees and DoD contractor employees thus properly require that the written statement of reasons should be "comprehensive and detailed," and the latter directive properly includes the necessary requirement that the statement be accompanied by a "letter of instructions" informing the individual about the availability of an opportunity to be heard and the requirements for exercising it. The question is what standard should be applied in determining when the government may withhold "the substance of relevant supporting evidence."[70]

We think that of the current standards employed, only Section 3 of Executive Order 10865 (as implemented by Section 155.7(c) of Directive 5220.6), which requires the notice to be "as detailed and comprehensive as national security permits," approaches Constitutional minima.[71] In contrast, we believe unacceptable the approaches of the other directives. An individual facing the deprivation of either liberty or property interests is entitled to more information than would be afforded to "any person" under the Freedom of Information Act or the Privacy Act, and the right to meaningful notice cannot be withdrawn simply on the basis of the exercise of discretionary judgment not grounded solely in the consideration of national security.

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[69]See also Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171 (1951) ("Secrecy is not congenial to truth-seeking and self-rightousness gives too slender an assurance of rightness.") (Frankfurter, concurring).

[70]Closely related is the question of when the government may properly deny the right to examine evidence, and confront and cross-examine adverse witnesses.

[71]Moreover, for the reasons we detail in our discussion of the r#ghts to examine evidence, confront and cross-examine adverse witnesses, we believe that it is additionally required that the government not rely on any information that it is not prepared to subject to the test of the adversarial system of justice, unless the failure to be able to rely on that information would be substantially harmful to the national security. Of course, we recognize that sound Constitutional arguments have been advanced that would go further. As Justice Douglas observed:

> If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his "liberty," they must be put to the test of due process of law.

Peters v. Hobby, 349 U.S. at 352.

Moreover, any invocation of a national security exception to providing detailed and comprehensive notice must itself be the subject of review. Otherwise, there would be no basis upon which to test the appropriateness of the government's national security claim in light of the employee's Constitutional right to learn the true basis for the government decision resulting in a deprivation of Constitutionally protected rights. Accordingly, whether the government has properly withheld information on a claim of national security would itself be subject to judicial scrutiny, including in camera review of the material claimed privileged. See Molerio v. FBI, supra; Smith v. Schlesin#er, 513 F.2d 462, 477-78 (D.C. Cir. 1975).

D. The Opportunity to Respond, the Right to a Hearing, Confrontation and Cross-Examination

The directives provide a variety of procedures for responding to the notice of the denial or revocation of clearance, and providing an opportunity to be heard. The procedures established by directive and Executive Order for employees of civilian contractors are clearly the most detailed; yet it is unclear whether in practice the procedures actually provided to most DoD employees are substantially inferior to those accorded contractor employees. For example, although Executive Order 10450 and Directive 5200.2-R are both less detailed than the parallel provisions of Executive Order 10865 and Directive 5222.6, it must be recalled that many DoD employees are afforded protection under the CSRA in addition to whatever rights are provided by Executive Order or directive.

We here summarize briefly the principal hearing rights afforded under the directives; a more extensive summary of these procedures is contained in the attached Appendix - "Summary if Security Clearance Procedures."

DoD employees. DoD military and civilian employees are given an "opportunity to reply in writing" to the written statement of the reasons for clearance denial or revocation. They are also entitled to a written response, "as prompt as individual circumstances permit," consisting of the final reasons for the denial or revocation "as specific as privacy and national security considerations permit." Directive 5200.2-R at Sections 154.56(b)(2) and (b)(3). After receiving a response to their submission in reply to the written statement of reasons, DoD military and civilian employees are given an opportunity to appeal to "a higher level of authority designated by the Component concerned." The Directive provides no additional information regarding the nature of the appeal or the process involved. It does not, as a matter of right, provide for a hearing. See Directive 5200.2-R at Section 154.56(b)(4).

DoD contractor employees. DoD contractor employees are not only entitled to submit a written answer to the Statement of Reasons for denial or revocation, but must do so if they desire to request a hearing. See Directive 5220.6 at Section 155.7(d). Determinations regarding DoD contractor employees who have properly responded to the Statement of Reasons but did not request a hearing are made by an Examiner based upon a review of the file of all relevant material which could be adduced at a hearing. The individual will receive a copy of the relevant materials and have 20 days from receipt in which to submit documentary information in rebuttal, o. to explain adverse information in the file. Once this option is chosen, a hearing is no longer available. Directive 5220.6 at Section 155.7(e).

If, however, a hearing has been properly requested, the individual may appear with or without counsel; present evidence; and, as a general rule, inspect records and other physical evidence and cross-examine adverse witnesses, either orally or in writing. If classified records are withheld from the individual, they may be considered only if the DoD General Counsel determines that such evidence appears to be material and failure to receive and consider it "would be substantially harmful to the national security." Exceptions to the required opportunity for crossexamination of witnesses who have made adverse statements are conditioned on determinations of the reliability of the person and accuracy of the statement. Even then, the Directives requires that the final determination give consideration to the fact that such opportunity was not provided. Id. at Sections 155.6(h) - (j).

A copy of the hearing transcript and the Examiner's written findings for or against the individual on each allegation must be furnished to the individual, subject to deletions in the latter for classified information. Either side may appeal the Examiner's determination to the Appeal Board. Id. at Sec. 155.7(g) - (z).

NSA employees. NSA employees and persons detailed or assigned to NSA are not expressly afforded any opportunity to respond to a denial or revocation of clearance unless, as noted above, the denial or revocation necessitates removal and such action is taken pursuant to 5 U.S.C. #7532, rather than 50 U.S.C. #833. The directive governing clearance eligibility of NSA employees and persons detailed or assigned to NSA expressly provides that the proceedings of an NSA Board of Appraisal "shall not include . . . appeal from an adverse recommendation." Directive 5210.45 at Section IV.C. Again, however, if denial or revocation of clearance necessitates removal and such action is taken pursuant to 5 U.S.C. #7532 rather than 50 U.S.C. #833, the individual may, upon request, having a hearing "by an agency authority duly constituted for this purpose." Before any final adverse decision is made, the individual is entitled to a review of the case by the agency head, or his designee, who provides the individual with a written statement of his decision.

Access to SCI. A person for whom SCI access has been denied or revoked may, if permitted within the discretion of the Determination Authority, submit a written appeal to such Authority within 45 days of the date of notification of the reasons for denial or revocation. DCID 1/14, Annex B at Section 4b. Upon denial or revocation of SCI access, an individual may, in the exercise of the Determination Authority's discretion, be afforded an opportunity to submit a written appeal to the Authority. If the Authority reaffirms a denial or revocation of access, the individual may request a final review of the case by the Senior Intelligence Officers, or his designee, who shall personally review the case and exercise his discretion in making a final and unreviewable decision. DCID 1/14, Annex B at Sections 4b - 4d.

Hearing Procedures. As we noted earlier, where DoD employee property interests in employment are at stake, the CSRA provides extensive hearing rights, which we have assumed meet the requirements of due process.[72]

Interestingly enough, the directives have generally relied on the national security provision of Section 7532 of the CSRA to provide an alternative procedural route to those otherwise available under the directives.[73] Although Section 7532 provides for summary suspension and cuts-off review under the Administrative Procedure Act, it gives non-probationary employees who are U.S. citizens and who have permanent or indefinite appointments, procedural rights, including: a written statement of charges; an opportunity to respond and submit affidavits; a hearing; a review by the agency head or his designee; and, a written statement of the decision of the agency head. Section 7532 hardly serves to cut-off procedural rights prior to a final decision. Rather its main attribute is to permit summary suspension and eliminate review by the Merit Systems Protection Board, which reviews Section 7513 actions, even in national security cases. See Egan v. Department of the Navy.

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[72]We also assume that Executive Order 10865 provides the process due employees of civilian contractors who are deprived of a property interest in employment.

[73]DoD military and civilian employees need not be afforded the stated "procedural benefits" where the Secretary determines that such procedures "are not appropriate" and acts pursuant to 5 U.S.C. #7532 to suspend and remove the individual "as necessary in the interests of national security." Directive 5200.2-R at Section 154.56(c). Likewise, the Directive governing NSA personnel states that determination of clearance eligibility by a Board of Appraisal is not required before action may be taken under what is now 5 U.S.C. #7532.

The principal issue presented is whether Executive Order 10450 and Directive 5200.2-R, Directive 5210.45, DCID 1/14 provide adequate procedures where liberty interests are implicated. As we have previously noted, there are no fixed rules concerning the content of the name clearing hearing, and the cases are mixed on the question of the nature of the hearing rights that must be accorded where a reputational liberty interest is at stake. Unquestionably due process does not necessarily require the presence of each and every feature of procedures such as those established by Directive 5220.6. Clearly some aspects of the procedural rights detailed in that directive could be modified, or even deleted. But there is a thrust to that directive (and the Executive Order which it implements) that is simply not reflected in the other directives, an# which is fundamental to any notion of fairness. In short, only civilian contractor employees are assured by directive or Executive Order that the hearing rights provided will assure a meaningful opportunity to be heard.[74]

For purpose of our analysis we have focused on one particular feature of the process: the opportunity to know the relevant factual bases relied upon for the decision to deny or revoke a clearance, and the opportunity to test the accuracy of that evidence.[75] Directive 5220.6 addresses the matter in two ways. First, it does not compel a complicated and lengthy process. As a threshold matter, the employee is required to indicate affirmatively which are the disputed issues for which he desires a hearing. See Section 155.7. The Directive sets forth the alternative of a decision based on documentary evidence, based on

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[74]That is not to say that a meaningful opportunity to be heard cannot and has never been provided to DoD employees who do not have the benefit of the protections of the CSRA. It is that the vague provisions of Executive Order 10450, and the various other directives, do not assure that a meaningful opportunity will generally, much less always, be provided.

[75]We also note, without discussing at length, the basic due process requirement of a neutral decisionmaker. In this regard we observe that the Defense Security Clearance Office ("DISCO") is a component of the Defense Investigative Service ("DIS"). DIS is an investigative and administrative body that assures the safeguarding of classified information entrusted to private contractors. DIS also conducts clearance investigations, but except with respect to its own employees does not make clearance determinations. DISCO, a component of DIS, does make clearance determinations for civilian contractors. We would note that it at least raises a question to have a decisionmaking body as a component of an investigatory body. See 5 U.S.C. #554(d)(2) (person who presides over an adjudicative proceeding may not be responsible to the supervision or direction of a person engaged in the performance of investigative or prosecuting functions for the agency).

the relevant materials in the file and any rebuttal documents or explanation provided by the individual. See Section 155.7(e). This alternative process is salutary. It compels the individual to state what is really at issue, and permits the avoidance of an oral hearing if it is not desired. The governmental interests, the individual interests, and the interests of fairness are thereby served.

Second, if the individual puts at issue specific allegations contained in the stated reasons for the action, and desires a hearing to challenge the factual basis of the allegations, the directive affords that hearing opportunity. At such a hearing, the individual is generally afforded the opportunity to present witnesses, examine evidence, and cross-examine adverse witnesses.

We begin an examination of that procedure by looking back at Greene v. McElroy. There the Court firmly held:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

Greene v. McElroy, 360 U.S. at 496 (emphasis added).[76]

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[76]Justice Douglas had made the same point four years earlier in his concurring opinion in Peters v. Hobby:

> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to crossexamination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths, or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under crossexamination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by people who, though sincere, have poor faculties of observation and memory.

349 U.S. at 350-51.

Of the two Executive Orders, and indeed compared to all the Directives, only Executive Order 10865 is very detailed with respect to the right of confrontation and cross-examination. That is not surprising because that Executive Order was issued in response to the Greene v. McElroy, which had so severely criticized the earlier clearance program which had not provided such rights and permitted the use of confidential informants. See R. W. Wise and N. L. Provost, New Procedures for Industrial Security Hearings, 28 Geo. Wash. L. Rev. 886 (1960). Therefore, it is by no means an accident that the Executive Order should take such unusual pains to spell out these procedural rights.

Does the Constitution require that every person denied a clearance or who has his clearance revoked be entitled to orally confront and cross-examine every source of government information? The answer is clearly no. For example, in some cases there may be no factual dispute; and in those circumstances an opportunity to "argue" may be sufficient. Likewise the government may not rely on any testimony; and in those circumstances it does not appear that the absence of crossexamination will be fatal, as long as the employee has the affirmative right to present his own case. Endicott v. Huddleston, 644 F.2d 1208, 1216 (7th Cir. 1980); see also, Doe v. Casey, 796 F.2d at 1524.

Accordingly, broad formulations of the applicable principle have simply indicated that due process requires an opportunity to refute the charges "either by cross-examination or independent evidence." Doe v. Department of Justice, 753 F.2d at 1114, quoting, Campbell v. Pierce County, 741 F.2d at 1345.

But, in cases like Greene, fundamental fairness will also require an opportunity to confront and cross-examine witnesses and testimony upon which the government relies in causing a deprivation of liberty interests.[77] Of course, there may be circumstances where the interests of national security demand that the opportunity for confrontation and cross-examination be curtailed. In this regard, we think that Executive Order 10865, as implemented by Directive 5220.6, has struck an appropriate balance.

Under the Executive Order, there generally is an opportunity to cross-examine "persons who have made oral or written statements

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[77]The court in Adams v. Laird, 420 F.2d 230, 237-38 and nn. 5 and 6 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970) held that no due process claim could be made out where the claimant accepted the option of submitting written interrogatories in lieu of insisting on oral cross-examination, and the claimant failed to submit such interrogatories. However, the court specifically disclaimed deciding the result if the claimant had not consented to the use of written interrogatories and was denied the opportunity for oral cross-examination.

adverse to the applicant relating to a controverted issue." There are only two general exceptions to this right:

> (i) where it is certified that the person who furnished the information is a "confidential intelligence source and that disclosure of the source's identity "would be substantially harmful to the national interests" (Section 4(a)(1)); and
>
> (ii) where the person who furnished the statement cannot appear to testify (a) due to death, severe illness, or similar cause (in which case the identity of the person and the information to be considered shall be made available to the applicant), or (b) due to some other cause determined by the head of the department to be "good and sufficient." The agency must, however, first determine that the statement "appears to be reliable and material, and... that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security...." Section 4(a)(2).[78]

Even in such cases, additional protection are provided, including providing the applicant with a summary of the information ("as comprehensive and detailed as the national security permits"); giving consideration to the fact that the testimony was not subject to cross-examination, and requiring that any adverse determination be made only by the head of the department based upon his personal review of the case. Section 1(b).

These procedures are likely to be viewed as fundamentally fair and comporting with the requirements of due process. They appear a fair way of dealing with the rights of the individual to confront and cross-examine the sources of the government's claims, yet provide a mechanism to protect national security.[79]

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[78]Similar rules govern the propriety of receipt and consideration of classified materials. See Section 5(b).

[79]We would note that even these procedures are subject to the potential for abuse. Clearly, Section 4(a)(2)'s general exception for other "good and sufficient" reasons is a potential loophole that could swallow-up the rule. Whether or not that is in fact the case is difficult to decide in a vacuum. Those

IV. IMPLICATIONS FOR DoD POLICYMAKERS

Our analysis raises a number of important issues that should be included in any consideration of uniform procedures to deny or revoke security clearances.

As we have discussed, the denial or revocation of a security clearance will in many if not most cases have an adverse impact on a person's current or future employment opportunities. As a consequence, the minimum Constitutionally adequate uniform procedures must assume such adverse impact. Otherwise, those procedures will be inadequate in some cases, even if there are circumstances where no liberty or property rights are affected. Rather than seeking the lowest common denominator, uniform procedures must seek the highest level of protection likely to be required; and for many circumstances that level is quite high.

To illustrate, many though not all civilian DoD employees have a property interest in continued employment with no loss of grade or pay. For those in the competitive service and preference eligibles, adverse action may only be taken pursuant to the procedures contained in 5 U.S.C. #7513, or, in the event of a suspension or dismissal, alternatively under 5 U.S.C. #7532. In either case, nothing in a revised Executive Order can diminish the requirements imposed by Congress under the CSRA. Therefore, whenever the denial or revocation of a security clearance would result in adverse action triggering the procedures contemplated by 5 U.S.C. ##7512 and 7513, those procedures must at a minimum be provided.[80]

Likewise, many civilian contractors protect their employees against discharge by assuring them continued tenure in the absence of "cause" or other disqualifying basis. Such protections may be embodied in collective bargaining agreements, individual contracts or even in employee guides and handbooks. If the government's denial or revocation of a clearance has the effect of adverse action, against which protection is provided by contract (or common practice) then employee property rights will trigger due process protections. It simply will not be known, or knowable, which contractor employees are protected by private contract provisions. Again, a uniform clearance denial or revocation process must rise to a level that will provide such employees no less than the minimum process due.

On the other hand, we assume that some civilian employees of DoD, some civilian employees of DoD contractors and most if not all uniform personnel have no property right to continued

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[80]Those Congressionally mandated procedures must be provided even if they exceed the requirements of due process.

employment or appointment. However, as we have noted, the price that must be paid for a uniform system applicable to all such persons (or even two systems divided along the lines of Executive Orders 10450 and 10865) will provide some persons with more procedural protections than they would otherwise be entitled on account of their "property interest" in continued employment without loss of pay or grade.

Moreover, even assuming that there are no property rights at issue (such as is the case, for example, for probationary DoD civilian employees and uniformed personnel), any denial or revocation of a security clearance may implicate liberty interests. We know from a review of the case law that liberty interests are defined by the particular circumstances. Even assuming that in some cases no liberty interests will be implicated, such as was held in the Molerio and Cafeteria Workers cases, many cases will present that impact. Certainly, liberty interests will be impacted wherever the basis for the denial or revocation forecloses future employment opportunity within or without the federal government. We think it reasonable to expect that for most persons the denial or revocation of a security clearance is as a practical matter a badge of dishonor that will prejudice if no# foreclose a class or range of opportunities.

We think that as a practical matter the government is unable to assure that such consequences will never flow.[81] As noted above, any procedures applied across the board must, by definition, provide to all at least those minimum protections that must be afforded to any one group or class of persons, even if such protections would not otherwise be required in all cases. Therefore, from a legal and policy perspective, any uniform procedure to be adopted by Executive Order must assume that the denial or revocation of a security clearance will always implicate the property and liberty interests.

As a practical matter, it will be difficult to establish a uniform set of procedures that does not provide at least the protections set forth in 5 U.S.C. ##7513 and 7532. Otherwise, in any individual case, the policy must inquire whether the revocation or denial of the clearance constitutes adverse action triggering the requirements of the CSRA. Some pre-deprivation pr#cess must be provided unless, as Section 7532 permits, national security mandates summary suspension pending dismissal. The essence of the pre-deprivation process due is "an initial check" against mistakes.

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[81]In this respect, we think apt the observation of the Doe v. Casey court that, as a practical matter, no other agency will second guess an intelligence agency's denial or revocation of a person's security clearance. In some ways the government sits on the horns of a dilemma. On the one hand, if a government agency, particularly an intelligence agency, has made a determination

See Loudermill and Brock v. Roadway Express. More elaborate procedures may be provided later, as even Section 7532 recognizes.

The single most intriguing question in our judgment is the appropriate balance between national security considerations and the individual's due process right to know the bases for the government's decision, and to confront and cross-examine those who have testified or produced evidence against them. In Greene v. McElroy, the Supreme Court, in compelling fashion, rejected as inconsistent with fundamental fairness (i.e., due process) for Mr. Greene to be denied a security clearance without an opportunity to confront and cross-examine those government informants who supplied the underlying basis for the denial.[82] We think that Executive Order 10865, issued by President Eisenhower in response to Greene, did well to wrestle with the problem of reachin# an appropriate balance between the competinq 9overnmental and individual interests. #herever possible, the 9overnment should look to rely on non-confidential information in making and supporting its clearance decisions. Where that is not possible, the government should seek to disclose as much as is consistent with national security to provide the individual a "meaningful opportunity" to contest the information providing the basis for the security clearance revocation/denial decision and the stigma associated with that decision. This includes not only learning the true basis for the decision, but the right to confront and cross-examine witnesses against him. Even this approach, while providing more than some might prefer, does not go as far as others believe necessary.[83]

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[82]The importance of confrontation and cross-examination in the clearance denial/revocation process was underscored by Justice Justice Douglas in his concurring opinion in Peters v. Hobby, 349 U.S. at 352 ("The use of faceless informers is wholly at war with th[e] concept [of due process].").

[83]Indeed, Justice Douglas had persuasively argued:

> If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his "liberty," they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise.

Peters v. Hobby, 349 U.S. at 352 (Douglas, concurring). Under that formulation, the government could never rely on a confidential informant. Executive Order 10865 and Directive 5220.6 should, therefore, be seen as presenting a moderate compromise position that attempts to balance the competing interests.

While due process is not rigid formula to be applied, the Constitution does require that fundamental fairness be provided. As a matter of public policy, much less Constitutional imperative, we think DoD should be loathe to be abandon the procedural protections considered rudimentary to fundamental fairness by the Supreme Court almost 30 years ago in Greene v. McElroy and adopted by President Eisenhower in Executive Order 10865.

APPENDIX

SUMMARY OF SECURITY CLEARANCE PROCEDURES[1]

1. Military and Civilian Employees of the Defense Department

The adjudicative policies and procedures for determining security clearance eligibility for military and civilian employees of the Defense Department are prescribed in DOD Directive 5200.2-R, "Personnel Security Program." 52 Fed. Reg. 11219 (April 8, 1987) [32 C.F.R. Part 154]. The authority for the program derives from Executive Order 10450, as amended, "Security Requirements For Government Employees," 5 U.S.C. 7311 note (April 27, 1953), which requires agency heads to ensure that the employment or retention of individuals in certain "sensitive" designated positions "is clearly consistent with the interests of national security." See ##154.40(a) and 154.42(a).

In its preamble, Executive Order 10450 noted "the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government..." In a similar vein, the Directive acknowledges the need to recognize "the significance each adjudicative decision can have on a person's career and to ensure the maximum degree of fairness and equity in such actions..." To that end, the Directive provides that no final personnel security determination resulting in an unfavorable administrative action, as defined, shall be made without granting the individual concerned certain specified "procedural benefits." Section 154.56(a).

"Unfavorable administrative action" includes both adverse action (e.g., removal, suspension, reduction in grade or pay) as the result of a personnel security determination, as well as an "unfavorable personnel security determination," which is defined,

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[1]We have focused our analysis on the existing procedures utilized to revoke or deny security clearances. Three basic directives are involved: DoD Directive 5200.2-R (civilian and military employment); DoD Directive 5220.6 (clearance of employees of contractors); and CIA Directive 1/4 (across the board procedures and criteria for clearance to sensitive compartmented information). This scheme, however, is not exclusive. For example, DoD Directive 5200.2-R does not indicate whether there is judicial review of a removal which is, for all intents and purposes, the direct result of the revocation of a clearance. Yet the Civil Service Reform Act provides for review to the Merit Systems Protection Board Review where such removal is taken pursuant to the "for cause" provision of the CSRA, 5 U.S.C. ##7512 and 7513. See Egan v. Department of the Navy, 802 F.2d 1563 (Fed Cir. 1986), cert. granted, 55 U.S.L.W. 3789 (May 26, 1987) (No. 86-1552).

at Section 154.3(dd), to consist of any of the following actions based on "derogatory information of personnel security significance":

- denial or revocation of clearance for access to classified information;

- denial or revocation of access to classified information;

- denial or revocation of a Special Access authorization (including access to SCI);

- non-appointment to or non-selection for appointment to a sensitive position;

- non-appointment to or non-selection for any other position requiring a trustworthiness determination under this program;

- reassignment to a position of lesser sensitivity or to a non-sensitive position; and,

- non-acceptance for or discharge from the Armed Forces.

Before any final personnel security determination resulting in any of the above is made, the affected individual is to be given:

1. A written statement of the reasons why the unfavorable administrative action is being taken. The statement is to be as comprehensive and detailed as permitted consistent with national security and the protection of sources afforded confidentiality under the Privacy Act. Section 154.56(b)(1).

2. An opportunity to reply in writing. Section 154.56(b)(2).

3. A written response to any reply submitted by the individual, which states the final reasons for the determination as specifically as privacy and national security considerations permit. Section 154.56(b)(3).

4. The opportunity to appeal. Section 154.56(b)(4).

The Directive, however, provides an exception to its policy requiring "procedural benefits" where the Secretary of Defense determines that such procedures "are not appropriate" and acts pursuant to 5 U.S.C. #7532 to suspend or remove an employee as "necessary in the interests of national security." Section 154.56(c). It should be noted, however, that while Section 7532

permits summary suspensions, it provides non-probationary employees who are U.S. citizens and have permanent or indefinite appointments are entitled, after suspension and before removal, extensive procedural rights, including: a written statement of charges; and opportunity to respond and submit affidavits; a hearing; a review by the agency head or his designee; and, a written statement of the decision of the agency head. 5 U.S.C. #7532(c).[2]

Each clearance or access determination, whether favorable or unfavorable, must be entered into the Defense Central Security Index (DCSI), a supplement of the Defense Central Index of Investigations (DCII). Section 154.43(a). The "rationale underlying" each unfavorable administrative action must be "reduced to writing" in the DCSI, where it is subject to the FOIA and the Privacy Act, as implemented by DOD regulations, 32 C.F.R. Parts 286 and 286a. Section 154.43(b). The DCSI serves as "the central repository of security related actions," and is used to provide statistical data for senior DOD officials, Congressional committees, the GAO, and "other authorized Federal requesters." Section 154.3(e). Investigative reports may be used only for purposes of determining eligibility for access to classified information; assignment or retention in sensitive duties or other specifically designated duties requiring such investigation; law enforcement and counterintelligence investigations; or other uses subject to the specific written authorization of the DUSD(P). Section 154.65. They are available outside the Defense Department only with the specific approval of the investigative agency having authority over the control and disposition of the reports. Section 154.67(a). Access to such reports within DOD is limited to designated DOD officials who require access in connection with specifically assigned personnel security duties, or any of the other activities specifically identified above.

Access to "personnel security clearance determination information" -- an undefined phrase apparently encompassing all information generated in the clearance process except "investigative reports" -- is generally made available pursuant to the FOIA and the Privacy Act and, otherwise, "through security channels, only to DOD or other officials of the Federal Government who have an official need for such information." Section 154.67(d).

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[2]Suspensions and removals taken after compliance with the Section 7532 procedures are, however, not reviewable before the Merit Systems Protection Board. The MSPB, however, has review authority for adverse personnel actions taken under Sections 7512 and 7513, which provide an alternative basis for action. See Egan.

2. Employees of Contractors of the Defense Department

The adjudicative policies and procedures for determining the security clearance eligibility of employees of contractors of the Defense Department are set forth in DOD Directive 5220.6, "Defense Industrial Personnel Security Clearance Review Program" (32 C.F.R. Part 155).[3] The Directive implements Executive Order 10865, "Safeguarding Classified Information Within Industry," 25 Fed. Reg. 1583 (February 20, 1960), as amended by Executive Order 10909 (January 17, 1961).

As in Executive Order 10450, which provides the authority for the DOD Personnel Security Program, the preamble to Executive Order 10865 acknowledged that "it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment." This Executive Order was issued in direct response to the Supreme Court's decision in Greene v. McElroy, which had harshly condemned the procedures then being utilized.[4] However, the latter order went further to specifically ensure that the provisions and procedures necessary to protect classified information "recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interests."

Section 3 of Executive Order 10865, as amended, states the general rule that "an authorization for access to a specific classification category may not be finally denied or revoked... unless the applicant has been given the following:"

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[3]By agreement, the Directive applies to 18 other federal #gencies and departments for administration of their needs to grant or continue a security clearance for access to classified information by persons employed by U.S. industry. Sec. 155.2(b).

A proposed revision to the Directive was published on May 6, 1987 (52 Fed. Reg. 16864).

[4]As is discussed at some length at pages _-_, the Court's #echnically only ruled that the then existing pr##edure was not properly authorized either by Congress or the President. The decision was understood, however, to say much more, i.e., that loyalty determination process that, among other things, did not provide for confrontation or cross-examination, would be unconstitutional. Perhaps this explains the higher level of procedural detail, particularly with respect to the right of cross-examination, which was the focus of the Greene decision. In contrast, Executive Order 10450, which was issued in 1953 - six years before the Greene decision - is substantially less specific with respect to particular procedural rights.

1. "A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits."

2. "A written reply to the statement of reasons, the form and sufficiency which may be prescribed by the regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee ... for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf."

3. "A reasonable time to prepare for that appearance."

4. "An opportunity to be represented by counsel."

5. "An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant." The applicant's opportunity to cross-examine "persons who have made oral or written statements adverse to the applicant relating to a controverted issue" is generally required except in two situations where receipt and consideration of the such statements is permitted without affording an opportunity for cross-examination.[5] In such cases, additional protection are provided, including providing the applicant with a summary of the information ("as comprehensive and detailed as the national security permits"); giving consideration to the fact that the testimony was not subject to to crossexamination, and requiring that any adverse determination be made only by the head of the department based upon his personal review of the case. Section 4(b).[6]

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[5] The first situation is where the head of the agency certifies that the person who furnished the information is a "confidential intelligence source and that disclosure of the source's identity "would be substantially harmful to the national interests." Section 4(a)(1).

The second situation is where the agency head or his special designee for that particular purpose has determined that the person who furnished the statement cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall

[6] Where "records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue" cannot be inspected by the applicant because they are classified, similar additional protections are provided. See Section 5(b).

6. Written notice of the final decision, and if adverse, specifying whether findings were made for or against him with respect to each allegation in the statement of reasons.

Presumably in recognition of the effect that a denial or revocation of clearance can have on an individual's reputation, the Executive Order also contains a disclaimer stating that "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty #f the applicant concerned." Section 7. However, it is difficult to square this statement with that contained in the Directive that its procedures only do not apply to cases in which a security clearance is withdrawn by DISCO for administrative reasons with no finding of prejudice to a later determination as to clearance eligibility, nor does it apply to cases in which an interim clearance is withdrawn by DISCO during an investigation, or to cases in which DISCO does not transfer a security clearance. Section 155.2(d). Certainly, by implication, the acti#ns that are taken are prejudicial with respect to clearance eligibility.

Finally, the Executive Order provides that nothing contained in its provisions "shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires." Section 9. Such authority is non-delegable and may be exercised only when the head of the agency determines that the procedures prescribed in sections 3, 4 and 5 "cannot be invoked consistently with the national security..." This determination shall be "conclusive." This provision is similar to Section 154.56(c) of Directive 5200.2-R, which, as noted above, refers to the statutory authority of an agency head under 5 U.S.C. 7532 to remove an employee as "necessary or advisable in the interests of national security."

The policy set forth in DOD Directive 5220.6 for the Defense Industrial Personnel Security Clearance Review Program closely follows the requirements of Executive Order 10865, as amended, in applying the standard derived from Section 2, i.e., that security clearance be granted and continued only be done upon a finding that it is "clearly consistent with the national interest."

By its terms, the Directive, both in its present form and with proposed revisions, generally follows the procedures set forth in the Executive Order. However, additional procedures apply when the DIS or DISCO identify investigations in which there is a substantial question whether it would be clearly consistent with the national interest to grant or continue a security clearance. Such cases must be referred to the Directorate for Industrial Clearance Review (DISCR) with a statement explaining the basis for referral. Section 155.7(a).

Upon referral, DISCR must make a determination promptly whether to grant or continue clearance, to issue a Statement of Reasons as to why it is not clearly consistent with the national interest to do so, or to take other interim action, including, but not limited to directing further investigation or recommending the suspension of security clearance. Section 155.7(b).

A security clearance cannot be denied or revoked unless the applicant has been provided with a written Statement of Reasons, which must be "as detailed and comprehensive as the national security permits." Section 155.7(c). A letter of instructions with the Statement of Reasons must explain that the applicant may request to have a hearing conducted after answering the Statement of Reasons, as well as the consequences for failure to respond to the Statement of Reasons within the prescribed time frame. Id. To be entitled to a hearing, the applicant must first have submitted a written answer to the Statement of Reasons, admitting or denying each listed allegation, and must elect to have a hearing. Section 155.7(d). If a hearing is properly requested, the applicant may present evidence on his or her behalf and, as a general rule, may cross-examine adverse witnesses, either orally or in writing. Section 155.7(g).

After such hearing, the hearing examiner makes written findings and reasons therefor, for or against the applicant with respect to each allegation in the Statement of Reasons. The examiner's determination is to be made under the standard of whether or not it is clearly consistent with the national interest to grant or continue the applicant's eligibility for access to classified information.

The applicant is provided with a copy of the examiner's determination, and where evidence is received under Section 155.6(h) and (i), which permits limits on cross-examination and access, the determination may require deletions in the interest of national security. Section 155.7(q).

In the event of an adverse determination, the applicant may appeal the determination to an Appeal Board for review. Section 155.7(w).

3. NSA personnel.

DOD Directive No. 5210.45, issued May 9, 1964, governs clearance procedures for NSA personnel. Although the Directive explicitly is intended to implement the Internal Security Act of 1950, as amended, Public Law 88-290, rather than Executive Order 10450, it relies upon the same personnel security standard as the Executive Order, i.e., that no person shall be employed in, or detailed or assigned to, the NSA, and no person shall have access

to classified information of the NSA, unless such action "is clearly consistent with the national security."

The Directive, at section IV, requires the NSA Director to establish one or more Boards of Appraisal, consisting of three members each, to which the NSA Director must refer "those cases in which he determines that there is a doubt as to eligibility for access to classified information of an employee or person assigned or detailed to the Agency." The Board is required to "appraise the loyalty and suitability" of persons referred to it and "advise the Director whether access to classified information by such persons is clearly consistent with the national security" by reference to the criteria in DOD Directive 5210.8, February 15, 1962.

The Directive, at section IV.C., explicitly provides that "proceedings of a board shall not include notice to the individual, right to a hearing, or appeal from an adverse recommendation." Moreover, the report submitted with the recommendation to the Director "shall not be made available to the person."

The Directive, at section IV.D., states that appraisal by a board is not required before action may be taken under a cited provision which, presumably, is 5 U.S.C. 7532 prior to recodification, "or any other similar provision of law." The Directive, at section V.A., states that section 303(a) of the public law cited authorizes the Secretary of Defense to terminate the employment of any officer or employee of the NSA in his discretion "whenever (1) he considers such action to be in the interest of the United States, and (2) he determines that the procedures prescribed in other provisions of law that authorize the termination of employment of that officer of employee cannot be invoked consistently with the national security." Such action is #eemed final.

When the two conditions above do not exist, the Directive provides, at section V.B., that the NSA Director shall, "when appropriate, take action pursuant to other provisions of law, as applicable to terminate the employment of a civilian officer or employee." The Director shall recommend that the Secretary exercise the above-stated authority only where the termination of a civilian officer or employee cannot, "because of paramount national security interests," be carried out under any other provision of law."

4. Security Clearance Eligibility for SCI

Security clearance eligibility for access to Sensitive Compartmented Information ("SCI") by all U.S. Government civilian and military employees, consultants, contractors, and contractor employees is governed by Director of Central Intelligence Directive No. 1/14 (May 13, 1976) (hereinafter referred to as "DCID No. 1/14").

Because SCI access is controlled under the strictest application of the "need to know" principle, the common appeals procedure established in Annex B to DCID 1/14 for denial or revocation of access to SCI are severely limited and narrow when compared to the general DOD clearance procedures. Annex B, promulgated September 28, 1981, states

> The provisions of DCID 1/14, this annex, or any other document or provision of law shall not be construed to create a property interest of any kind in the access of any person to SCI. Further, since the denial or revocation of access to SCI cannot by the terms of DCID 1/14 render a person ineligible for access to other classified information solely for that reason, the denial or revocation of SCI access pursuant to the provisions of DCID 1/14 and this annex shall not be construed to create a liberty interest of any kind." See DCID 1/14, paragraph 3.

As a consequence, no procedural rights are assured. Annex B, at paragraph 4a, indicates that "persons shall be:

> 1. notified of the denial or revocation of SCI access,
>
> 2. notified that they may request to be provided the reasons for such denial or revocation, and/or
>
> 3. afforded an opportunity to appeal,

whenever the Determination Authority of any entity, in the exercise of his discretion, deems such action in any given case to be clearly consistent with the interests of the national security." Therefore, in the absence of the exercise of such discretion, those procedures will not be afforded.

If those procedure are provided, however, any person given notification and afforded an opportunity to appeal may submit a written appeal of the denial or revocation to the Determination Authority. Paragraph 4b. After a further review of the case in the light of the written appeal, the person will be notified of the decision of the Determination Authority. Paragraph 4c. If the Determination Authority reaffirms a denial or revocation of access, further review may be had by the Senior Intelligence Officer ("SIO"), or his designee. Such review shall be exercise his discretion pursuant to the provisions of DCID 1/14, and shall inform the person of his decision, which shall be final and unreviewable. Paragraph 4d.

REVIEW OF WORK OF MR. RONALD PLESSER CONCERNING CONSTITUTIONAL DUE PROCESS REQUIREMENTS AND U.S. DEPARTMENT OF DEFENSE POLICIES AND PROCEDURES FOR THE DENIAL AND REVOCATION OF SECURITY CLEARANCES

by

John Norton Moore

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by

John Norton Moore

I.

INTRODUCTION

This paper is a review of the work of Mr. Ronald Plesser concerning "Constitutional Due Process Requirements and United States Department of Defense Policies and Procedures for the Denial and Revocation of Security Clearances." It is part of a series of studies intended to assist possible preparation of a new draft executive order in the area of personnel security.

Mr. Plesser's paper and analysis is a high quality work product. It focuses in detail on "the meaning of liberty and property" within the due process clause of the Fifth Amendment and "the due process hearing requirement" of that clause. Moreover, it contains a useful section on "implications for DoD policymakers." Its most significant omission is that it does not discuss equal protection, an issue of possible significance in view of currently different procedures for different categories of personnel and the work statement background note that "[a]t issue is whether these two distinct approaches to due process should continue, or if there should be a uniform policy for clearing DoD employees, military personnel and contractor employees." It should also be noted that the Moore-Martin-Menefee study focuses more on cases with Defense Department and national security

components whereas the Plesser study incorporates more general due process case law.

In assessing both studies, it is important for the Executive Branch policy-makers considering a new draft executive order in the area of personnel security to focus on the overall context, that is, to keep in mind the "big picture" and not to become too legalistically focused. A purely legalistic focus in resolving these issues may not only not optimally serve the important national interests at stake, but may also be less satisfactory as legal guidance.

II.

GENERAL CONTEXT OF THE PROBLEM

First, it should be noted that simply complying with minimum legal requirements will not necessarily ensure good procedures that both meet important national security and individual rights needs. That is, a starting point for the preparation of any new procedures is to recognize that there is a potential wide range of procedures likely to meet minimum constitutional and other legal guarantees in this area. Of course, procedures should and must meet legal requirements, but in the first instance they should be structured to effectively achieve the critically important national interests in protecting the integrity of classified information as well as individual due process. Moreover, in the core area of cases clearly affecting the national security of the United States, courts have generally given wide latitude to protection of those security interests. Thus, an initial review might seek to determine what kinds of procedural changes would enhance security and individual rights.

Second, it should be understood that there is not always great certainty in the law in the area of personnel security cases. The most important Supreme Court cases in this area, Greene v. McElroy (360 U.S. 474 1959), and Cafeteria Workers v. McElroy (367 U.S. 886 1961), were both decided 5-4 and, like all cases, were highly sensitive to the exact facts of the case. Greene was certainly heavily influenced by the majority's sense that an underlying first amendment associational right was at stake and that the employment impact of the decision on the individual may have been major. Cafeteria Workers may have been heavily influenced by the

need to protect security on military installations, and the likelihood that the complainant could readily secure employment elsewhere. Moreover, none of these cases squarely presented a challenge of direct harm to the national security of the United States, as opposed to more peripheral procedural issues. As such, a sensitive understanding of the principal underlying policies at stake -- and of the need to fully protect the national security in an area of direct threat -- may be a better guide than the quest to precisely categorize these landmark decisions. Certainly one should not be misled by abundant citation of authority into an illusion of legal certainty with respect to personnel security cases. And just because existing regulations may be lawfui -- as generally would seem the case -- does not mean either that they are the best possible regulations in protecting the national security or even that they provide the most appropriate standards of protection for the individual.

III.

POLICIES AT STAKE IN PERSONNEL SECURITY PROCEDURES CONCERNING ACCESS TO CLASSIFIED INFORMATION

There are two principal policies at stake in personnel security decisions concerning access to classified information.

First, there is a critically important national security interest in maintaining the integrity of the classification system. Access to classified information is not simply an opportunity at federal employment but rather access to secrets whose compromise could potentially do grave harm to the national security. Enough cases of such compromise have received public disclosure in recent years that this principal is widely appreciated. As the level of access includes activities of NSA, CIA and other entities concerned with sources and methods, the potential national harm is even greater. Thus, as a starting point, a federal personnel security program should effectively protect the integrity of the classification system. Moreover, it would seem reasonable to establish more stringent procedures as access to sensitive compartmented information or to installations dealing with sources and methods, codes, or other particularly sensitive categories of classified information or activities, is at stake.

Second, to the extent possible while protecting core security interests, we should -- as a society built on individual freedom -- seek to fairly treat federal personnel and contractors and to respect their liberties and freedoms. Generally, this means that unless contradicted by important security needs, federal employees and contractors should have fair notice of actions affecting them, should be permitted in an appropriate fashion to present a case in their own behalf, and should have an impartial decision-maker.

The difficulty arises in those settings where these two major interests may clash. Where there is no fairness or constitutional rights issue, then, of course, security issues will be paramount. Where there is no security cost in providing appropriate guarantees, such guarantees should be provided. Where there is a clash between these important interests, as possibly in connection with access to certain accusing witnesses in security hearings, then procedures should be sought to protect the security interest while minimizing the fairness problem. For example, national security provisions in other settings have sometimes used in camera judicial proceedings without individual access to sensitive information but with an opportunity for a judge to review the sensitivity of the material. Finally, when there is a direct and irreconcilable clash between national security and individual fairness or other constitutional rights the Courts have generally shown substantial deference to the security interests, provided, and this is an important provided, they are convinced the potential national security harm is real and substantial.

Finally, it should be noted that any categorizations of procedures should be reasonably related to serving the security and individual fairness interests. To the extent that they are not they may undermine both interests and even risk constitutional attack.

Obviously, the challenge of personnel security procedures is to devise a system that will maximize all interests at stake, both the integrity of the classification system and individual fairness. If, however, after all reasonable efforts are made and a particular practice genuinely and demonstrably would pose a significant security risk, I believe that Courts would on the whole be responsive to the problem. It should be remembered that even in the core area of first amendment freedoms we know that the Supreme Court has repeatedly indicated

that it is prepared to protect the national security, provided it is convinced that the security threat is real and substantial.

IV

OVERALL FRAMEWORK FOR LEGAL AND POLICY ANALYSIS OF THE PROBLEM

It might be useful in appraising the Plesser study -- and all other studies in this area --to provide a brief overview framework for legal and policy analysis of personnel security procedures concerning denial and revocation of security clearances. Such a framework would at least include the following:

I. Policy Formulation of Procedures and Regulations
Have regulations and procedures been formulated to optimize the policies at stake?

II. Legal Appraisal of Procedures and Regulations
Have regulations and procedures been formulated to comply with all constitutional, statutory and administrative legal requirements? These would at least including the following:

A. Possible Constitutional Issues

1. Fifth Amendment due process guarantees
   a. is the interest a protected interest in "life, liberty, or property?"

      i. employment rights as a property right
      ii. damage to reputation or future employment opportunities
      III. involvement of fundamental constitutional freedoms

b. If the interest is protected (and here the Plesser study is probably wise in urging that it be generally assumed that such interests are at stake), have the requirements of procedural due process been met?

i. an impartial decision-maker
ii. adequate notice of the basis of action
iii. an opportunity to present evidence to the decision-maker
iv. a chance to confront and rebut evidence against the individual
v. a fair hearing process [use of the Mathews v. Eldridge balancing test]

c. If the interest is protected and the requirements of procedural due process have been met, have the requirements of substantive due process been met?

i. any affected fundamental constitutional rights such as first amendment rights of expression and association
ii. rational "nexes" between basis for action and the security threat.

2. Equal Protection Guarantees

a. the appropriate standard of review concerning the relationship between the classifications drawn and the proper governmental purpose

b. application of that standard of review to classifications in the security regulations

B. Possible Statutory or Administrative Requirements

Have the regulations and procedures been formulated to comply with all relevant statutory or administrative regulations or should any such statutory or administrative provisions be altered?

C. Application of the Relevant Law to all Categories of Procedures and Regulations

For the most part, both the Plesser and Moore-Martin-Menefee studies suggest that existing personnel security regulations would meet the requirements of this legal checklist. Neither study addresses how such procedures might be altered to better serve the underlying goals at stake. Nor is either study able to discuss which procedures, if any, in the current procedures are inadequate from a security standpoint and in such cases to examine whether alternate procedures could be devised that would pass legal scrutiny. Nor has either study examined ways in which additional personnel fairness procedures might be accorded where such procedures would not reduce security. Certainly, the separate historical evolution of procedures for military/DoD employees versus DoD contractors as a result of the Greene decision is not by itself an adequate basis for maintaining separate procedures in these categories. Such categories should be maintained as separate (or new categories created) only where to do so better serves the underlying goals at stake or there is simply no effect on policies and preparation of the new procedures simply is not worth the effort and expense. Indeed, unless existing categories do serve a reasonable purpose, they may at some point risk an equal protection challenge.

V.

CONCLUSION

The study of Ronald Plesser is a high quality study. It does not cover the issue of equal protection concerning the basis for classification in personnel security programs. More importantly, neither the Plesser study nor the Moore-Martin-Menefee study focus on the critical importance of personnel security procedures being optimally drawn to achieve the national interests at stake in such programs, as opposed to meeting minimal legal guarantees. Questions that should be

answered in any further review of personnel security procedures relating to access to classified information include, in addition to the legal review:

(1) Where can such procedures be strengthened to protect the integrity of the classification system and national security at no cost to procedural fairness and individual rights?

(2) Where can such procedures be strengthened to protect procedural fairness and individual rights at no cost to security?

(3) In settings where security and individual rights may clash, what new procedures might be devised to minimize or control the clash?

(4) In settings, if any, where procedural rights demonstrably and significantly harm security interests, what legislative or other options might exist to better protect both the national security and individual rights at stake?

It should be stressed that while the general outline of the law in this area is reasonably understood, the specific resolution of cases by the Courts pursuant to that outline retains substantial uncertainty. In that setting, a legalistic approach may not be as helpful a guide to legal prediction as a common sense approach rooted soundly in the values at stake in the personnel security system.

APPENDIX

BRIEF STATEMENT OF VIEWS BY SAMUEL PYEATT MENEFEE

The review of the security clearance material which you asked me to undertake has yielded the following points:

(1) Differences in the two papers appear to derive from different approaches. The Plesser group made many of its arguments by analogy to non-DoD related cases. Our report was, I think, based on the premise that national security interests were sufficient to distinguish such matters from non-DoD cases. We, therefore, cited few "outside" cases (and none for a non-DoD context) while covering several security clearance cases (e.g. Adams, McKenna, and others) which do not appear to be mentioned by Plesser.

(2) Additionally, there appears to be a different understanding of the relationship between Greene and Cafeteria Workers. Plesser notes that the former does not reach the issue, but appears to consider it morally controlling, or some such, and distinguishes Cafeteria Workers as an "exception to the rule." With this view it is not surprising that he supports the expanded individual rights suggested in Greene. We, on the other hand, would, I suggest, have viewed the two as opposite ends of a spectrum, and have suggested a more "balanced" approach as regards governmental rights.

(3) The Plesser group does not appear to grasp the importance of equal protection, thus their conclusions as to a single versus a dual system are incomplete.

(4) Note that we did not deal with DoD Directive S210.45 or DoD Directive 1/14.

(5) I totally agree with your assessment of (a) the lack of clear Supreme Court authority and (b) the current state of flux in the law.

Chapter 4

Legal Analysis by Mr. Emilio Jaksetic

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December 11, 1986

MEMORANDUM FOR ASSISTANT GENERAL COUNSEL (LEGAL COUNSEL)

SUBJECT: Due Process Aspects of Security Clearance Determinations

1. This memorandum is a preliminary analysis of whether the Due Process Clause of the Constitution applies to security clearance determinations by the U.S. Government and, if so, what procedures are required by the Due Process Clause before the Government may deny or revoke a security clearance. Because of time constraints, the analysis contained herein is preliminary only and requires further research and analysis.

2. Since the Supreme Court handed down its decision in Greene v. McElroy, 360 U.S. 474 (1959), it has been assumed that applicants for security clearance (hereinafter "applicant") are entitled to certain minimum due process rights before denial or revocation of security clearance by the Government. In the twenty-seven years that have elapsed since the Greene case, the state of the law with respect to the Due Process Clause has significantly evolved. Indeed, the developments in the case law that will be discussed in this memorandum suggest that portions of the Greene case and its reasoning are outdated in 1986. It is important that the DOD give the Greene case a careful look in light of the law as it has evolved since 1959, rather that blindly assume that the Greene case answered for all time any question about the due process rights of an applicant.

GREENE v. McELROY: A BRIEF REVIEW

3. The Greene case involved revocation of the security clearance of an aeronautical engineer who was vice-president and general manager of a defense contractor. Mr. Greene required a security clearance to be able to perform his duties with his company. DOD told Mr. Greene that his security worthiness was suspect because of his alleged associations with Communists. Mr. Greene responded to the allegations and appeared, with counsel, before a four-member Board. Mr. Greene testified on his behalf, and presented witnesses to corroborate his testimony and to testify as to his good character. However, the Board relied on confidential reports containing statements adverse to Mr. Greene and denied him any opportunity to cross-examiner the confidential sources. The Board issued a decision adverse to Mr. Greene, and

he was subsequently discharged from his company (with which he had been for 16 years) after his security clearance was revoked.

4. Mr. Greene was unsuccessful in finding employment in the aeronautics field because he lacked a security clearance. He brought suit, contending that the DOD decision to revoke his security clearance denied him liberty and property without due process of law. The Supreme Court expressly declined to address the question of whether an applicant has a property or liberty interest in a security clearance. See, 360 U.S. at 492-493. However, the Supreme Court found that neither the President nor Congress had authorized procedures permitting the denial or revocation of a security clearance without first affording to affected individuals an opportunity for confrontation and cross-examination of the evidence against them. See, 360 U.S. at 499-508. The Supreme Court reversed and remanded the case on the limited ground that there was no express Presidential or Congressional authorization for the type of procedures used in Mr. Greene's case, and expressly declined to decide whether such procedures would pass constitutional muster if expressly authorized by the President or Congress. See, 360 U.S. at 508.

5. One portion of the Greene opinion warrants special attention. Specifically, the Supreme Court used the following language:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny." 360 U.S. at 496-497 (citations omitted).

This passage sets forth certain principles that clearly were a key factor in the Supreme Court's handling of the Greene case. Furthermore, this passage is likely to be cited against the Government in any litigation arising out of a denial or revocation of a security clearance without an opportunity for confrontation and cross-examination. Like other Supreme Court

pronouncements, the above-quoted passage has taken on a life of its own that is separate and apart from the facts of the Greene case. Accordingly, any changes in the Government's security clearance programs must be made with an appreciation that the talismanic language of Greene will place a heavy burden on the Government to demonstrate why the Greene case is distinguishable or superseded by subsequent case law.

THE LAW SINCE GREENE v. McELROY

6. At least one court has suggested that the Supreme Court limited the scope of the Greene decision when it issued its decision in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). Stein v. Bd. of City of New York, 792 F.2d 13,16 n.2 (2d Cir. 1986). However, a close reading of Cafeteria Workers indicates that it distinguished the Greene case on its facts rather than expressly limit the scope of the Greene decision. More specifically, the Supreme Court found Greene distinguishable because (a) there was explicit authorization for the system attacked in Cafeteria Workers, 367 U.S. at 889-894, and (b) there was no governmental action which bestowed a "badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." 367 U.S. at 898.

7. As indicated earlier, the Supreme Court in Greene, expressly declined to address the question of whether an applicant has a liberty or property interest in a security clearance. Therefore, the Greene case provides no meaningful basis to decide whether an applicant has a liberty or property interest in a security clearance. (As will be discussed later, whether an applicant has a liberty or property interest in a security clearance is crucial to whether or not he is entitled to any due process procedural protections, and if so, what form such procedures must take).

8. With a few exceptions, subsequent security clearance cases appear to merely assume, without deciding, that applicants have certain due process rights. One District Court has expressly held that applicants have a liberty or property interest in a security clearance. Shoultz v. McNamara, 282 F. Supp. 315,318 (N.D. Cal. 1968), rev'd on other grounds 413 F.2d 868 (9th Cir. 1969), cert.den.sub.nom. Shoultz v. Laird, 396 U.S. 962 (1969). The D.C. Circuit has intimated that denial of a security clearance on the basis of a finding of mental illness implicates the applicant's liberty interest. Smith v. Schlesinger, 513 F.2d 462,477 (D.C. Cir. 1975). The D.C. Circuit also has intimated that publication of a stigmatizing reason for denial of a security clearance may implicate a liberty interest. Molerio v. FBI, 749 F.2d 815,823-824 (D.C. Cir. 1984). And, the Federal Circuit appears to have held that denial of a security clearance implicates the applicant's liberty interest. Egan v. Dept. of Navy, 802 F.2d 1563,1572-1573 (Fed.Cir. 1986).

9. The District Court opinion in Shoultz is of dubious precedential value because it cites the Greene case as the basis of its finding of a liberty or property interest in a security clearance. Since the Supreme Court in Greene expressly declined to rule on the issue, the District Court in Shoultz could not reasonably rely on the Greene case to support its bald assertion of a liberty or property interest in a security clearance. As will be discussed later, the possibility of a liberty interest in a security clearance, as held or intimated by the courts in Egan, Molerio, and Smith, may viable as a legal principle under certain factual situations. However, that proposition cannot be viewed in isolation, but rather must be evaluated in the light of the body of case law concerning liberty interests.

10. Unfortunately, most cases do not specifically discuss or carefully analyze whether an applicant has a liberty or property interest in a security clearance. Such an analysis must be undertaken before any intelligible discussion can be undertaken with respect to what procedural protections, if any, an applicant for security clearance is entitled to. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olim v. Wakinekona, 461 U.S. 238,250 (1983). The Due Process Clause is triggered only when a liberty or property interest is implicated. Koerpel v. Heckler, 797 F.2d 858,863 (10th Cir. 1986); Munson v. Friske, 754 F.2d 683,692 (7th Cir. 1985); Walker v. United States, 744 F.2d 67,68 (19th Cir. 1984). Absent a liberty or property interest, a person is entitled only to whatever procedures are provided to him by statute or regulation. Sipes v. United States, 744 F.2d 1418,1420 (10th Cir. 1984). To paraphrase the Supreme Court's language in Bd. of Regents v. Roth, 408 U.S. 564,577 (1972), to be entitled to due process, a person must have a liberty or property interest at stake, not merely "an abstract need or desire" for due process, nor a mere "unilateral expectation" of such process. Absent any liberty or property interest, there is no basis in law to conduct a balancing of interests analysis to determine what level of procedural protection is appropriate or required by the Due Process Clause. Mazaleski v. Treusdell, 562 F.2d 701, 709 (D.C. Cir. 1977). In other words, until there is a determination whether an applicant possesses any liberty or property interest in a security clearance, any due process analysis is groundless. But see, Hoska v. U.S. Dept. of Army, 677 F.2d 131 (D.C. Cir. 1982)(reviewing security clearance determination, without any finding of a property or liberty interest, under "efficiency of the service" standard). And, as will be discussed later, any due process analysis requires a consideration of the precise nature of the individual's liberty or property interest. Therefore, even if it determined (or assumed) that an applicant has some type of property or liberty interest in a security clearance, the nature of that interest will figure into any analysis of what type or kinds of due process rights the applicant is entitled to.

11. Before proceeding with a specific analysis of what liberty or property interest(s) an applicant might have in a security clearance, some general comments are in order. First, the mere fact that the Government chooses to provide procedural protections to an individual (or class of individuals) does not, by itself, create any independent substantive rights. Olim v. Wakinekona, supra, 461 U.S. at 250-251; Asbill v. Housing Authority of Choctaw Nation of Oklahoma, 726 F.2d 1499,1502 (10th Cir. 1984)(citing cases from 5 other Circuits on point); Hadley v. County of DuPage, 715 F.2d 1238,1244 (7th Cir. 1983), cert.den. 456 U.S. 1006 (1984). Therefore, the provision of various procedural protections by Executive Order 10865 and its implementing regulations do not create any independent substantive rights in applicants. (Of course, an applicant can insist that the Government comply with the provisions of Executive Order 10865 and its implementing regulations. E.g., United States v. Nixon, 418 U.S. 683,695-696 (1974); Service v. Dulles, 354 U.S. 363,388 (1957); Doe v. U.S. Dept. of Justice, 753 F.2d 1092,1098 (D.C. Cir. 1985)). Second, if the grant of procedural protections by Executive Order 10865 and its implementing regulations is discretionary with the Executive Branch, then applicant's unilateral expectations of receiving such procedural protections in the future, no matter how long such protections have been granted in the past, do not arise to the level of constitutional entitlement protected by due process. See, Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458,465 (1981)(unilateral expectations of receiving a discretionary grant of clemency do not arise to level of constitutional entitlement protected by due process). Third, the mere fact that an individual suffers a grievous loss due to governmental action does not, in itself, invoke the procedural protections of the Due Process Clause; rather, the question is not merely the weight of the affected individual's interest, but whether that interest is a liberty or property interest. Jago v. Van Curen, 454 U.S. 14,17 (1981); Larry v. Lawler, 605 F.2d 954,957 (7th Cir. 1978)(same). See, Bd. of Regents v. Roth, supra, 408 U.S. at 570-571 ("But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake.")(emphasis in original). To the extent that the Greene case appears to suggest that the potentially grievous adverse economic impact that might ensue from denial or revocation of a security clearance implicates a property or liberty interest (360 U.S. at 496), the Greene case probably has been overtaken by subsequent case law. Fourth, any analysis of possible property or liberty interests in a security clearance must be undertaken with the realization that the courts will not view property or liberty in narrow or strictly technical terms, but rather as concepts that "relate to the whole domain of social and economic fact." Bd. of Regents v. Roth, supra, 408 U.S. at 571. Accord, Logan v. Zimmerman Brush Co., 455 U.S. 422,430-431 (1982). Despite this fact, the range of interests protected by procedural due process is not infinite in scope. Bd. of Regents v. Roth, supra, 408 U.S. at 569-570. When in doubt, courts probably will construe an individual's alleged property or

liberty interest broadly and in a liberal spirit. However, this prospect should not foreclose analysis by DOD of relevant case law to ascertain what limits the courts have placed on the parameters of alleged property and liberty interests and whether such limits have applicability to security clearance cases.

12. Two additional points should be made at this point. First, in the past, the courts recognized a distinction between "rights" and "privileges" when undertaking an analysis as to whether the Due Process Clause applied. See, e.g., Cafeteria & Restaurant Workers Union v. McElroy, supra, 367 U.S. at 895. For purposes of due process analysis, the distinction between "rights" and "privileges" is no longer viable. Morrisey v. Brewer, 408 U.S. 471,481 (1972); Graham v. Richardson, 403 U.S. 365,374 (1971). Second, the Supreme Court has rejected the notion that government (state or federal) has plenary authority, when creating governmental benefits, to limit the procedural protections associated with those benefits. Logan v. Zimmerman Brush Co., supra, 455 U.S. at 432. Regardless of what procedural protections the government may establish in creating a governmental benefit, such procedures are not immune from due process analysis if a liberty or property interest is involved.. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532,541 (1985). Nothing in the case law appears to preclude application of this principle to security clearances created or established by virtue of an Executive Order. In view of the preceding two points, it is highly unlikely that even express Presidential or Congressional authorization of a system of security clearances would be found to be exempt from judicial review today. Therefore, the fact that the Supreme Court expressly declined to rule on the question in the Greene case, 360 U.S. at 508, should not be taken as an invitation to proceed with an Executive Order on the assumption that express Presidential authorization will be sufficient to stave off a legal attack based on due process grounds. Subsequent developments in the law make any such attempt highly vulnerable to legal challenge and unlikely to prevail.

13. This memorandum will turn to a discuss of whether an applicant for security clearance has a property or liberty interest in such clearance and, if so, the nature of such an interest. After a discussion of the property and liberty interest issues, there will be a discussion of what procedural protections, if any, an applicant is entitled to.

PROPERTY INTEREST IN SECURITY CLEARANCE

14. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....'." Cleveland Board of Education v. Loudermill, supra, 470 U.S. at 538. A mere desire or abstract need for a benefit, or a unilateral expectation of receiving a benefit does

not give a person a property interest in that benefit. Bd. of Regents v. Roth, supra, 408 U.S. at 577. Nor does longevity in a given position, without more, create a property interest. Hadley v. County of DuPage, supra, 715 F.2d at 1244. Accord, Shlay v. Montgomery, 802 F.2d 918,923 (7th Cir. 1986). However, property is not limited to strict technical conceptions or definitions and may even arise out of mutually explicit understandings that support a person's claim of entitlement to a given benefit. Perry v. Sindermann, 408 U.S. 593,601 (1972). However, no property interest arises if the alleged understandings are based on unofficial or unauthorized acts or statements. Shlay v. Montgomery, supra, 802 F.2d at 922-923; Hadley v. County of DuPage, supra, 715 F.2d at 1242.

15. Absent specific legislation, federal employment can be revoked at the will of the appointing officer or official. National Treasury Employees Union v. Reagan, 663 F.2d 239,247 (D.C. Cir. 1981). Furthermore, absent specific legislation, the benefits and emoluments of federal employees (or federal positions) are derived from appointment rather than a contractual or quasi-contractual relationship with the Government. Chu v. United States, 773 F.2d 1226,1229 (Fed.Cir. 1985). However, even excepted service federal employees can obtain property interests in their positions on the basis of mutually explicit understandings within the meaning of the Perry case. Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979). Accord, Kizas v. Webster, 707 F.2d 524,539 (D.C. Cir. 1983), cert.den. 464 U.S. 1042 (1984). Such mutually explicit understandings cannot form the basis of a property interest in federal employment if they are based on unauthorized promises or statements made by federal officers or officials, or promises or statements that exceed the authority of the federal officers or officials. McCauley v. Thygerson, 732 F.2d 978,981 (D.C. Cir. 1984); Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093,1099-1100 (9th Cir. 1981), cert.den. 455 U.S. 948 (1982); Fiorentino v. United States, 607 F.2d 963,967-968 (Ct.Cl. 1979), cert.den. 444 U.S. 1083 (1980). Simply put, statements by federal officers or officials cannot give rise to a property interest in a federal position or benefit (within the meaning of the Due Process Clause) if such statements are unauthorized or made in excess of authority. Furthermore, mere longevity in a federal position, without more, does not create a property interest in that position. Bollow v. Federal Reserve Bank of San Francisco, supra, 650 F.2d at 1099. Accord, Castro v. United States, 775 F.2d 399, 406 (1st Cir. 1985). Nor does the failure of the federal government to terminate another federal employee in a similar situation, in itself, give rise to a mutually explicit understanding to retain a given federal employee. Bollow v. Federal Reserve Bank of San Francisco, supra, 650 F.2d at 1099. Nothing in the case law appears to preclude application of these principles to the military. However, it is very unlikely that a court will find a property interest in a position with the military. See, e.g., Wilson v. Walker, 777 F.2d 427,428-429 (8th Cir. 1985)(National Guard officer has no property interest in

flight status and its accompanying benefits); Rich v. Secretary of Army, 735 F.2d 1220,1226 (10th Cir. 1984)(no property interest in continuation of military career); Blevins v. Orr, 721 F.2d 1419,1422 (D.C. Cir. 1983)(no liberty or property interest in a military promotion per se).

16. I am unaware of any federal statute or Executive Order that arguably creates any property interest in a security clearance. Furthermore, it is unlikely that anything in Executive Order 10865 or its implementing regulations creates any such property interest in an industrial security clearance. There is no recognized property interest which entitles a person or business to participate in the awarding of government contracts without regard to the terms and conditions placed upon such contracts by the Government. J.H. Rutter Rex Manufacturing Co., Inc. v. United States, 706 F.2d 702,712 (5th Cir. 1983), cert.den. 464 U.S. 1008 (1985). Therefore, the mere fact that certain defense contracts require contractors, subcontractors or their employees to possess a security clearance does not implicate any property interests. An applicant's unilateral desire or economic need for a security clearance does not give rise to a property interest in a security clearance. (To illustrate: if a Government contract requires the contractor or his employees to have a driver's license or some form of professional license or certification to be eligible to perform the Government contract, it is unlikely that such a requirement, in itself, would be found by a court to give rise to a property or liberty interest in a driver's license or professional license or certification). And, the mere fact that a given individual might have possessed a security clearance for many years does not, without more, create a property interest in that security clearance. See cases cited in preceding paragraph.

17. What requires more consideration is whether there is anything about the practices and procedures of the Government with respect to the granting of security clearances that could be construed as giving rise to a mutually explicit understanding that could support an applicant's claim of entitlement to a security clearance under the rationale of Perry v. Sindermann, supra. Any detailed analysis is beyond the scope of this paper because it would require analysis of the specifics of all security clearance programs in the federal government. However, such an analysis should be made. If a court were to find that Government practices with respect to granting a security clearance gave rise to such mutually explicit understandings within the meaning of Perry v. Sindermann, then a property interest arises and the Due Process Clause applies to any decision to suspend, revoke or terminate any such security clearance. I have found nothing in the case law that even suggests that certain types of positions or benefits (e.g., security clearances) are beyond the scope of the Perry v. Sindermann analysis merely because of the intrinsic nature of such positions or benefits.

18. Although a detailed analysis of the practices and procedures of the Government with respect to the granting of security clearances is beyond the scope of this paper, several points warrant a brief discussion. First, particular attention should be paid to the circumstances under which the Government has authorized defense contractors to grant "company confidential" security clearances. (Absent any delegation of authority to defense contractors by the Government, defense contractors do not act as agents for the United States. See, S.O.G.-San Ore-Gardner v. Missouri Pacific Railroad Co., 658 F.2d 562,567 (8th Cir. 1981)(company does not become agent of federal government merely because it has contract with government to build a bridge for it)). Depending on the nature of any such a delegation of authority, it is possible that a defense contractor might be held by a court to have created a mutually explicit understanding enforceable against the Government. (As indicated earlier, promises or statements made without, or in excess of authority, cannot form the basis of a mutually explicit understanding giving rise to a property interest within the meaning of Perry v. Sindermann. I see no reason why the same principle would not be applied to the unauthorized statements of defense contractors). Second, the DOD should analyze whether applicants for industrial security clearance can satisfy the requirements of third-party beneficiaries of any defense contracts between the United States and defense contractors. If so, then they may have an alternative basis to assert a property interest against the United States. If not, there they probably have no basis to assert a property interest against the United States. And, even if an employee of a defense contractor were found to have some rights under a defense contract, those rights probably would not be greater than the rights of the defense contractor. Cafeteria & Restaurant Workers Union v. McElroy, 284 F.2d 173,180 (D.C. Cir. 1960), aff'd on other grounds 367 U.S. 886 (1961). Third, the Government should consider whether legal principles applied to trade secrets and proprietary information in the private sector may be applied by analogy to security clearance cases. After all, it would be ironic if applicants for security clearance were assumed to have more rights to access to classified information than employees have to access to trade secrets or proprietary information in the private sector. Surely, the unique nature of classified information, the compelling interest of the United States in protecting and safeguarding classified information (CIA v. Sims, -- U.S. --, 105 S.Ct. 1881, 1891 (1985)), and the fact that access to classified information implicates sensitive aspects of the Government's sovereign functions in the area of defense and national security, all militate in favor of strong and compelling Governmental interests in classified information that are at least equal to, and probably stronger than, any private interests in trade secrets and proprietary information.

19. In view of the foregoing, pending further analysis of defense contracts and Government practices in the granting of security clearances, it will be tentatively assumed that it is

unlikely that a court will find that an applicant has a property interest in a security clearance (with its concomitant access to classified information). However, the absence of a property interest in a security clearance does not preclude a finding of a liberty interest within the meaning of the Due Process Clause. See, Ratliff v. City of Milwaukee, 795 F.2d 612,625 (7th Cir. 1986); Doe v. U.S. Dept. of Justice, supra, 753 F.2d at 1106-1107; Walker v. United States, supra, 744 F.2d at 69; Wells v. Doland, 711 F.2d 670,676 (5th Cir. 1983). Therefore, it is necessary to consider whether any applicant has a liberty interest in a security clearance.

LIBERTY INTEREST IN SECURITY CLEARANCE

20. As indicated earlier (paragraph 11, supra), the courts probably will not give a narrow or technical meaning to the concept of a liberty interest. However, that does not mean that the concept of a liberty interest has no bounds. Indeed, as the following discussion will demonstrate, the courts have placed some limits on the concept of liberty interest, and those limits have some bearing on security clearance cases. (Even a business entity can be found to have a liberty interest. Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953,961-962 (D.C. Cir. 1980). Therefore, the mere fact that a facility security clearance is involved does not, in itself, preclude a court from considering whether a liberty interest is implicated by the denial or revocation of a security clearance).

21. Generally, a liberty interest is implicated if the Government (a) makes defamatory or stigmatizing charges against an individual, (b) the charges are disputed, (c) the charges are publicized, and (d) as a result of the publication of the false stigmatizing charges, the individual is foreclosed from taking advantage of other employment opportunities or exercising some other legal right. As the discussion which follows indicates, all four elements must be present for a liberty interest to be implicated. A closer consideration of the case law is necessary to appreciate the scope and implications (including limitations) of each aspect of the liberty interest concept.

22. Defamatory or stigmatizing charges. Not all adverse charges by the Government constitute the type of defamatory or stigmatizing allegation that may implicate a liberty interest. Simply put, not every remark that may arguably adversely affect a person's reputation constitutes the type of stigmatizing charge that may implicate a liberty interest. The following reasons for dismissal from government employment have been found not to be the type of defamatory or stigmatizing charges that implicates the employee's liberty interest: (a) unfavorable statements as to employee's proficiency or charges of substandard performance, Hewitt v. Grabicki, 794 F.2d 1373,1380 (9th Cir. 1986); Debose v. U.S. Dept. of Agriculture, 700 F.2d 1262,1266 (9th Cir. 1983);

Nathanson v. United States, 630 F.2d 1260,1264 (8th Cir. 1980), appeal after remand 702 F.2d 162 (1983), cert.den. 464 U.S. 939 (1983); (b) poor work habits and low productivity, Stritzl v. U.S. Postal Service, 602 F.2d 249,252-253 (10th Cir. 1979); (c) failure to meet level of management skill required for position, Hadley v. County of DuPage, supra, 715 F.2d at 1245; and (d) failure to perform duties to satisfaction of supervisor, Bailey v. Kirk, 777 F.2d 567,572-573 (10th Cir. 1985)(case involving suspension, not termination from employment). In order to implicate a person's liberty interest what is required is a type of charge or allegation that imposes a "badge of infamy," impugns the person's moral character or integrity, or otherwise might seriously damage the person's reputation in the community. See, e.g., Doe v. Dept. of Justice, supra, 753 F.2d at 1111 (citing examples of charges found by courts to be stigmatizing or defamatory); Mazaleski v.Treusdell, supra, 562 F.2d at 714 (same). Many of the typical examples of charges cited to denial or revoke a security clearance (e.g., criminal or dishonest conduct, alcohol or drug abuse, mental illness or condition impairing judgment and reliability, or poor judgment, unreliability or untrustworthiness) probably would be found to be the type of defamatory or stigmatizing allegation that may implicate a liberty interest. See, e.g., Smith v. Schlesinger, supra, 513 F.2d at 477 (denial of security clearance on basis of alleged mental illness implicates person's liberty interest). However, the mere fact that an individual was denied a security clearance for unspecified reasons "in no way implies disloyalty or any other repugnant characteristic" and, therefore, does not constitute a stigma for purposes of any alleged liberty interest. Molerio v. FBI, supra, 749 F.2d at 824. See, Bollow v. Federal Reserve Bank of San Francisco, supra, 650 F.2d at 1101 (dismissal by federal government for unpublicized charges does not infringe employee's liberty interest). Interestingly, absent any allegations of disloyalty, dishonesty or lack of integrity, allegations that an applicant violated security regulations might not be considered to be the type of defamatory or stigmatizing charge that implicates a liberty interest. See cases cited earlier in this paragraph. See also, Cafeteria & Restaurant Workers Union v. McElroy, supra, 367 U.S. at 898-899 (denial of access to military installation for failure to meet security requirements without suggestion of disloyalty or intentional wrongdoing does not bestow "a badge of disloyalty or infamy"). Also, purely administrative reasons for termination or discontinuance of a security clearance (e.g., no further "need-to-know" a specific level of classified information, completion of project and no further need for access to classified information, retirement or other separation from military service or federal employment without any need for access to classified information, administrative reduction in number of security clearances granted) probably would not be found to constitute the type of defamatory or stigmatizing reasons that would implicate a liberty interest.

23. Falsity of charges. Even if the charge(s) against an applicant are deemed to be defamatory or stigmatizing in nature, no liberty interest is implicated if the applicant does not dispute the substantial truth or accuracy of the charges. E.g., Codd v. Velger, 429 U.S. 624,627-628 (1977); Williams v. West Jordan City, 714 F.2d 1017,1021 (10th Cir. 1983); Wells v. Doland, supra, 711 F.2d at 676 n.7; Orloff v. Cleland, 708 F.2d 372,378 (9th Cir. 1983); Painter v. FBI, 694 F.2d 255,256 (11th Cir. 1982). The rationale behind this legal principle is that the purpose of a hearing is to provide a person the opportunity to rebut false or incorrect charges and to clear his name, and no useful purpose would be served by mandating a hearing when the person does not claim that the charges are substantially false or inaccurate. Codd v. Velger, supra, 429 U.S at 627-628. See, Beckham v. Harris, 756 F.2d 1032,1038 (4th Cir. 1985), cert.den. 106 S.Ct. 232 (1985)("An opportunity to confront his accusers or present exculpatory evidence serves no useful purpose when the accused himself has admitted the very acts which compromise his character or impugn his integrity.") In practical terms, this principle means that if an applicant admits the allegations against him (or fails to assert that they are substantially false or inaccurate), then no liberty interest is implicated, no matter how damaging those charges may be to the applicant's name or reputation. (Whether the charges are objectively true or false is not the controlling factor. Rather, it is whether the accused person alleges that the charges are substantially false or inaccurate). Nor is a person, who does not dispute the factual basis of the charges against him, entitled to a hearing merely to argue for leniency or a departure from applicable regulations in his case. Dixon v. Love, 431 U.S. 105,113-114 (1977). Accord, Cleveland Bd. of Education v. Loudermill, supra, 470 U.S. at 543 n.8. (Although there is no due process right to a hearing merely to ask for leniency or clemency, the Government may, in its discretion, provide for such a hearing if it wishes).

24. As indicated earlier (paragraph 4, supra), the Federal Circuit has held that an applicant had a liberty interest when denied a security clearance. Egan v. Dept. of Navy, supra, 802 F. 2d at 1572-1573. A reading of the facts of Egan indicates that Egan did not contest the truth or accuracy of the allegations against him, but merely sought to explain or seek to mitigate his conduct. Because Egan did not contest the substantial truth or accuracy of the charges against him, no liberty interest was implicated. See cases cited in paragraph 22. See also, Smith v. Lehman, 689 F.2d 342,345-346 (2d Cir. 1982), cert.den. 459 U.S. 1173 (1983) (liberty interest not implicated where NIS investigator admitted falsifying official record and merely sought to justify his conduct). Therefore, the Federal Circuit erred in Egan when it found a liberty interest implicated.

25. Publication of charges by Government. Even assuming arguendo that the charges are defamatory or stigmatizing in nature and the applicant alleges they are substantially false or inaccurate, no liberty interest is implicated if the Government

does not publicize the charges. Cleveland Bd. of Education v. Loudermill, supra, 470 U.S. 532,547 n.13 (1985); Bishop v. Wood, 426 U.S. 341,348 (1976). Absent some publicizing of the reasons for its action, the mere fact that the Government dismisses an employee does not amount to a stigma infringing a liberty interest. Bd. of Curators of University of Missouri v. Horowitz, 435 U.S. 78,83 (1978); Shlay v. Montgomery, supra, 802 F.2d at 924; Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062,1069 (6th Cir. 1984); Debose v. U.S. Dept. of Agriculture, supra, 770 F.2d at 1266; Painter v. FBI, supra, 694 F.2d at 256; Harrington v. United States, 673 F.2d 7, 11 (1st Cir. 1982); Mazaleski v. Treusdell, supra, 562 F.2d at 712. See, Hewitt v. Grabicki, supra, 794 F.2d at 1380 (critical comments contained in confidential personnel files, not subject to public disclosure, do not infringe an individual's liberty interest); Sims v. Fox, 505 F.2d 857,863-864 (5th Cir. 1974)(en banc), cert. den. 421 U.S. 1011 (1975)(absent publication, mere presence of derogatory information in government files does not infringe liberty interest). The requirement for publication of the allegedly false stigmatizing charges is not a mere technicality. Even where it is demonstrated that the dismissal disadvantages the employee's search for future employment, dismissal by the Government without disclosure of the reasons for dismissal does not infringe any liberty interest. Boland v. Blakey, 655 F.2d 1231,1232 (D.C. Cir. 1981). Simply put, absent publication of the specific reasons for the dismissal, the adverse inferences that may be drawn from the fact of dismissal by the Government are insufficient to implicate a liberty interest. Bollow v. Federal Reserve Bank of San Francisco, supra, 650 F.2d at 1101. See, Rich v. Secretary of Army, supra, 735 F.2d at 1226 n.5 (no liberty interest impinged by mere fact of honorable discharge and non-retention by military).

26. To implicate a liberty interest, the publication must be made by the Government (or someone acting on its behalf). Therefore, disclosure of the charges by someone other than the Government does not constitute publication. See, Shlay v. Montgomery, supra, 802 F.2d at 924. Furthermore, not all disclosures by the Government satisfy the publication requirement of the liberty interest case law. Where the Government publicizes the allegedly false derogatory information at the behest of the individual who is the subject of the charges, that individual cannot claim that his liberty interest was impaired. Rich v. Secretary of Army, supra, 735 F.2d at 1227. Nor does disclosure of the charges in the course of a litigation brought by the person against the Government satisfy the publication requirement. Bishop v. Wood, supra, 426 U.S. at 348; Ratliff v. City of Milwaukee, supra, 795 F.2d at 627. Thus, an individual cannot sue the Government, force disclosure of the charges against him during the course of the litigation and then claim that his liberty interest was impaired by the disclosure of the charges against him. Finally, it is worth noting that any publication by the Government must occur in the course of the adverse Governmental action. Otherwise, there will come a time

when any publication of the defamatory or stigmatizing charges after the adverse action by the Government becomes sufficiently remote from the adverse action to dissipate the nexus between the two. Hadley v. County of DuPage, supra, 715 F.2d at 1246. Unfortunately, there is not sufficient basis in the case law upon which to determine what might constitute such a period of time.

27. The foregoing discussion raises an interesting question: if the Government does not publicly disclose the factual allegations or charges that form the basis of a denial or revocation of a security clearance, then is there no publication that implicates an applicant's liberty interest? This question is important in view of the Government's practice to not disclose information about the reasons for denial or revocation of a security clearance except in connection with inquiries from appropriate federal agencies concerning the individual's eligibility or suitability to be granted access to classified information. If the Government does not disclose the allegations or charges to anyone outside the Government (except to the applicant himself, or a third party at the request of the applicant), then it could be argued that there is no publication that implicates a liberty interest. See, Asbill v. Housing Authority of Choctaw Nation of Oklahoma, supra, 726 F.2d at 1503 (intragovernmental dissemination, by itself, falls short of Supreme Court's notion of publication in Bishop v. Wood). Cf. Perry v. FBI, supra, 781 F.2d at 1301 (noting absence of widespread dissemination of information throughout federal Government; distribution limited to a few specified law enforcement agencies in Executive Branch). However, the D.C. Circuit appears to take the position that even intragovernmental disclosures constitute sufficient publication to implicate a liberty interest. See, Conset Corp. v. Community Services Administration, 655 F.2d 1291,1296 (D.C. Cir. 1981); Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953,963 (D.C. Cir. 1980). And, the Federal Circuit appears to have found that dissemination of an adverse security clearance determination via the Defense Central Index of Investigations (DCII) constitutes sufficient publication to implicate a liberty interest. Egan v. Dept. of Navy, supra, 802 F.2d at 1573. (One aspect of these cases appears to be distinguishable from the typical disclosures about adverse security clearance determinations outside the Government: the Government may advise employers and others of the bare fact of an adverse security determination, but not the specific reasons for such a determination. (This fact may be very significant in any litigation involving an alleged liberty interest. See, Molerio v. FBI, supra, 749 F.2d at 824; Boland v. Blakely, supra, 655 F.2d at 1232; Bollow v. Federal Reserve Bank of San Francisco, supra, 650 F.2d at 1101). Further analysis is required to ascertain which view is a majority view or the better view, or if the Federal Circuit and D.C. Circuit cases can be distinguished. (In this regard, the opinion in Molerio v. FBI, supra, 749 F.2d at 824 n.3, raises a possibility that the D.C. Circuit may be willing to accept an argument that some types of limited

intragovernmental disclosures do not constitute publication for purposes of a liberty interest analysis).

28. "Stigma plus." Even assuming that the Government has publicized defamatory or stigmatizing charges against an individual which he alleges are substantially false or inaccurate, that still is not enough to implicate a liberty interest. "[R]eputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the prccedural protection of the Due Process Clause." Paul v. Davis, 424 U.S. 693,701-712 (1976). Accord, Baden v. Koch, 799 F.2d 825,829 (2d Cir. 1986); Hardiman v. Jefferson County Bd. of Education, 709 F.2d 635,638 (11th Cir. 1983); In re Selcraig, 705 F.2d 789,795 (5th Cir. 1983). Damage to one's reputation alone, no matter how serious, is not sufficient to support a claim of deprivation of a liberty interest. Koerpel v. Heckler, supra, 797 F.2d at 865. See, Mosrie v. Barry, 718 F.2d 1151,1158 (D.C. Cir. 1983) (fact that financial harm was caused by government imposed stigma is not sufficient to transform interest in reputation into a liberty interest). In other words, there must be "stigma plus" before a liberty interest is implicated. Doe v. U.S. Dept. of Justice, supra, 753 F.2d at 1108-1109; Hadley v. County of DuPage, supra, 715 F.2d at 1246. It is necessary to review some of the case law to ascertain the parameters of this notion of "stigma plus." As the following discussion will illustrate, the parameters of "stigma plus" are not as neat and clear cut as one might like.

29. Not all foreclosures of employment opportunities establish a deprivation of liberty. Larry v. Lawler, 605 F.2d 954,958 (7th Cir. 1978). The mere fact that "financial harm is caused by the government imposed stigma does not transform an interest in reputation into a liberty interest." Mosrie v. Barry, supra, 718 F.2d at 1158. Nor is a liberty interest implicated merely because non-retention in a given job might make a person somewhat less attractive to some other employers. Bd. of Regents v. Roth, supra, 408 U.S. at 574 n.13; Perry v. FBI, supra, 781 F.2d at 1302; Sipes v. United States, 744 F.2d 1418,1422 (10th Cir. 1984). See, Castro v. United States, supra, 775 F.2d at 407 (mere non-renewal of appointment, without more, does not constitute deprivation of liberty interest); Mervin v. FTC, 591 F. 2d 821,828 (D.C. Cir. 1978) ("Dismissal from employment, without more, might well make the search for a new job difficult. But this in itself is not a due process violation."). Nor is a liberty interest implicated where the charges merely result in reduced economic returns and diminished prestige. Munson v. Friske, 754 F.2d 683,693 (7th Cir. 1985). And the concept of liberty interest does not extend to situations where only an individual's opportunities for promotion or career advancement are adversely affected. Bigby v. City of Chicago, 766 F.2d 1053, 1057 (7th Cir. 1985); Mosrie v. Barry, 718 F.2d at 1161-1162. Cf. Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338,343 (5th Cir. 1978)(no liberty interest implicated where

public employee is retained in his position or transferred to another position even after being defamed by a public official). Furthermore, mere demotion may not be sufficient to implicate a liberty interest. Baden v. Koch, 799 F.2d 825,830 (2d Cir. 1986). But see, Lawson v. Sheriff of Tippecanoe County, 725 F.2d 1136, 1139 (7th Cir. 1984)(certain types of demotions may effectively exclude employee from his trade or calling so as to implicate a liberty interest); Mosrie v. Barry, supra, 718 F.2d at 1161 (suggesting that reduction in rank and pay might implicate a liberty interest). Finally, "[t]he reaction of others to unfavorable publicity about a person is not, within the meaning of Paul v.Davis, a change in legal status imposed by the government officials who generated the publicity." Mosrie v. Barry, supra, 718 F.2d at 1162. See, Bartel v. FAA, 725 F.2d 1403,1415-1416.

30. In view of the foregoing, what types of foreclsoure of economic opportunities implicate a liberty interest (assuming, of course, all other elements of the liberty interest analysis have been met and satisfied)? First, a total deprivation of any opportunity to hold any position with the federal Government is sufficient. Larry v. Lawler, supra, 605 F.2d at 957-959. Compare, Perry v. FBI, supra, 781 F.2d at 1302 (liberty interest not implicated where person's employment opportunities in certain areas of federal government were lessened, but there was no total foreclosure from employment with Government). Second, a total deprivation of any opportunity to enter into any contract with any government agency is sufficient. Smith & Wesson v. United States, 782 F.2d 1074,1081 (1st Cir. 1986); ATL, Inc. v. United States, 736 F.2d 677,683 (Fed.Cir. 1984); Old Dominion Dairy Products, Inc. v. Secretary of Defense, supra, 621 F.2d at 963. (In connection with any litigation where the plaintiff alleges the first or second type of deprivation, the Government should be ready to demonstrate to the court that, in most if not all cases, denial or revocation of a security clearance does not foreclose the person from all opportunities for federal employment or government contracts. See, Adams v. Laird, 420 F.2d 230,240 n.9 (D.C. Cir. 1969), cert.den. 397 U.S. 1039 (1970)(noting that denial of security clearance did not preclude individual from having any kind of employment with federal government)). Third, a deprivation of any opportunity to practice one's profession is sufficient. Munson v. Friske, supra, 754 F.2d at 693. (In connection with any litigation where the plaintiff alleges the third type of deprivation, the Government should be wary of any generalized, blanket claims that an individual's professional and career opportunities have been effectively foreclosed by denial or revocation of a security clearance. When faced with such general, blanket claims, the Government should promptly undertake discovery of the plaintiff to ascertain the factual basis for the claim, as well as to establish whether the plaintiff has made reasonable, good faith efforts to seek alternative employment in his occupation or career field. The results of such discovery may enable the Government to move to dismiss the case for failure to state a claim at an early stage of the litigation).

31. Unfortunately, the case law does not appear to provide a nice, neat delineation of all the types of adverse economic effects that implicate a liberty interest and those that do not. Clearly, there is a spectrum or range of adverse economic effects that may follow from the denial or revocation of a security clearance. Unfortunately, it is not clear where on the spectrum the courts draw the line as to what constitutes a minimum or threshold degree of adverse economic effect that implicates a liberty interest. The problem is compounded by the simple fact that, given the current state of the law, any such analysis probably would be performed by a court after the fact in a litigation contesting the denial or revocation of a security clearance. This subjects the Government to the risk that any decision it makes on this matter (even if performed in absolute good faith) will be second-guessed by a court. However, despite these uncertainties, it is likely that the courts will not find that the requirement of "stigma plus" is satisfied by denial or revocation of a security clearance in cases involving military personnel or federal employees so long as the individual involved is not terminated from military service or federal employment as a result of the adverse security clearance determination.

32. Even if a court were to find that denial or revocation of a security clearance impaired an individual's liberty interests, such a finding would not mandate or require restoration of his security clearance. The remedy for violation of a person's liberty interest is to provide that person with a meaningful opportunity to refute the charges made by the Government and seek to clear his name. See, e.g., Wells v. Doland, supra, 711 F.2d at 676. However, the issues in such a hearing (oral or otherwise) would be the truth and accuracy of the Government's charges against the person, not the propriety of the denial or revocation of the security clearance. See, Ratliff v. City of Milwaukee, supra, 795 F.2d at 627 n.4; Doe v. U.S. Dept. of Justice, supra, 753 F.2d at 1114.

PROCEDURAL PROTECTIONS WITH RESPECT TO THE DENIAL OR REVOCATION OF SECURITY CLEARANCES

33. As indicated earlier, absent a liberty or property interest, the Due Process Clause does not apply, and the Government is free to exercise its judgment and discretion as to what procedural protections, if any, it wishes to grant to applicants for security clearance. Of course, if any federal statute applies, then whatever procedural requirements mandated or required by that statute must apply. See, Egan v. Dept. of Navy, supra, 802 F.2d 1563 (holding that applicant entitled to certain procedural protections whenever removal is made pursuant to Section 7513 of Title 5 of the U.S. Code). Cf. Hoska v. U.S. Dept. of Army, supra, 677 F.2d 131 (applying "efficiency of service" standard to security clearance determination involving

federal civilian employee). And, even if there is no applicable statute and no liberty or property interest, then the Government must comply with whatever regulations it has promulgated.

34. As indicated earlier, process is not an end in itself. To merely assume that the Due Process Clause applies to all security clearance determinations is to beg the question and assume that there is some liberty or property interest involved. Furthermore, even if such an assumption were made, it would not answer the question of what type of minimum procedural protections are necessary under the Due Process Clause. As the discussion which follows indicates, it is simply incorrect to assume that the Due Process Clause requires full-blown adversarial hearings under any and all circumstances. See, e.g., Gray Panthers v. Schweiker, 716 F.2d 23,34-37 (D.C. Cir. 1983) (rejecting an "either-or" analysis with respect to whether oral hearings are required; instead a more particularized analysis is needed: where credibility or veracity is an issue, oral hearings may be required by due process; where credibility or veracity is not an issue, oral hearings may not be required by due process).

35. The Supreme Court has set forth a three-factor balancing test that should be undertaken to determine what procedural requirements the Due Process Clause requires:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathew v. Eldridge, 424 U.S. 319,335 (1976). Accord, Schweiker v. McClure, 456 U.S. 188,193-194 (1982). The Supreme Court also has characterized these factors in another, shorthand fashion: the formality and procedural requisites for a hearing may vary, depending on the importance of the interests involved and the nature of the subsequent proceedings. Cleveland Bd. of Education v. Loudermill, supra, 470 U.S. at 545; Bd. of Regents v. Roth, supra, 408 U.S. at 570 n.8. Unfortunately, the fine sentiments expressed by the Supreme Court are general and not readily translated into practical terms. Rather, the case law must be reviewed and considered in an effort to see if any practical clues or principles can be discerned from the application of the general terminology of Mathews to specific situations. Because of time constraints, no detailed analysis of the case law was possible. However, some preliminary comments can be offered.

36. Any serious economic interests of the affected person may be considered and weighed in any Mathews analysis. However,

any such economic interest cannot be viewed in isolation, but rather must be weighed in light of the Government's need to conduct its business effectively and efficiently. Old Dominion Dairy Products, Inc. v. Secretary of Defense, supra, 631 F.2d at 967-968. Simply put, the economic interests of an applicant for security clearance, however weighty they may be to the applicant, are not the only factor; nor are any such economic interests controlling or decisive. (To the extent that the Greene case appears to suggest otherwise, it has been overtaken by subsequent developments in the law). Likewise, financial cost to the Government is not a controlling factor is determining what due process requires, but the interest of the Government in conserving scarce fiscal and administrative resources is a factor that must also be weighed. This is because "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." Mathews v. Eldridge, supra, 424 U.S. at 348. See, Perry v. FBI, supra, 781 F.2d at 1301 (excessive burden on government of holding full evidentiary hearings for every unsuccessful FBI applicant is a factor to be considered under Mathews three-factor balancing test).

37. In undertaking any Mathews analysis of what minimum due process requirements are appropriate, several points need to be kept in mind. First, due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; rather, due process is flexible and depends on the given situation. Schweiker v. McClure, supra, 456 U.S. at 200; Bd. of Curators of University of Missouri v. Horowitz, 435 U.S. 78,86 (1978); Mathews v. Eldridge, supra, 424 U.S. at 334. Second, procedural due process in the context of administrative decisions "does not always require application of the judicial model." Dixon v. Love, supra, 431 U.S. at 115. Third, due process does not always require a full evidentiary hearing, Cleveland Bd. of Education v. Loudermill, supra, 470 U.S. at 545, or a full adversarial hearing. See, Riggins v. Bd. of Regents of University of Nebraska, 790 F.2d 707,712 (8th Cir. 1986)(due process does not require opportunity to cross-examine or confront witnesses prior to discharge of tenured university professor); Boston v. Webb, 783 F.2d 1163,1167 (4th Cir. 1986)("The right of cross-examination is therefore not an absolute in respect of all alleged deprivations of constitutionally protected property or liberty interests."); Perry v. FBI, supra, 781 F.2d at 1303 (noting person had ample opportunity to clear his name through variety of channels other than a full hearing); Orloff v. Cleland, 708 F.2d 372,379 (9th Cir. 1983) (indicating full evidentiary hearing not required under all circumstances); Conset Corp. v. Community Services Administration, supra, 655 F.2d at 1297 n.10 (contractor given opportunity to respond to contested charges not entitled to a formal hearing as a matter of right under Due Process Clause). Fourth, under certain circumstances, a hearing on written materials only is sufficient to satisfy the Due Process Clause. Baden v. Koch, supra, 799 F.2d at 832. This

case law makes clear that the Greene case, to the extent that it appears to suggest that a full evidentiary hearing (with confrontation and cross-examination of adverse witnesses) is necessary in all cases before the Government may deny or revoke a security clearance (360 U.S. at 496-498), probably has been overtaken by subsequent developments in the law concerning due process. (It should be noted that one Supreme Court decision has characterized the type of security clearance determination involved in the Greene case as being judicial or quasi-judicial in nature. Hannah v. Larche, 363 U.S. 420,452 (1960). This fact must be factored into any argument that the Greene case has been overtaken by subsequent developments in the law concerning due process).

38. Further discussion of the requirements of the Due Process Clause to security clearance determinations requires more analysis of the following matters: (1) the procedures and practices of the Government in granting, denying or revoking security clearances to (a) military personnel, (b) federal civilian employees, and (c) defense contractors and their employees; (2) the practical economic consequences that denial or revocation of security clearances have on individuals and defense contractors; (3) the fiscal and administrative impacts on the Government arising from its present security clearance programs, and consideration of what additional fiscal and administrative impacts might arise from any changes in its security clearance programs; and (4) further legal research on various points raised in this preliminary memorandum. The first category requires research to ascertain whether the Government's procedures and practices with respect to granting, denying or revoking security clearances may give rise to any colorable claim of a property interest in a security clearance on the basis of mutually explicit understandings within the meaning of Perry v. Sindermann. The second category requires research to enable the Government to make some educated guesses as to the likelihood that a person affected by an adverse security clearance determination will be able to satisfy the "stigma plus" requirement of any liberty interest claim. (Such research also might provide the Government with the basis to counter conclusory claims by aggrieved persons that denial or revocation of their security clearance has effectively foreclosed their employment or career opportunities). The third category requires research to enable the Government to be able to formulate and articulate a rational position in any litigation in which the Mathews three-factor analysis of due process is raised. (The third category requires research for another purpose: if the Government establishes a new system for security clearances that provides for less procedural protections that it has given in the past, then the Government must be ready to explain to a court the reasons -- political, fiscal or administrative -- why it felt that could not continue to provide the procedural protections it had provided in the past). The fourth category requires further research because this memorandum is merely a preliminary one, certain issues were necessarily

given abbreviated treatment, and the author is not an expert in many areas of law touched upon in this memorandum.

39. Any analysis of the requirements of the Due Process Clause to security clearance determinations must deal with the strong language of the Supreme Court in the Greene case with respect to the right of confrontation and cross-examination. See, 360 U.S. at 496-497. For the various reasons given throughout this memorandum, it should not be assumed that the courts will automatically apply the strong language of Greene without undertaking a detailed analysis of the underlying predicates of any property or liberty interest claim or the three-factor analysis of Mathews. However, there is a strong talismanic appeal to the ringing words of the Greene case that cannot be ignored. See, e.g., Nevels v. Hanlon, 656 F.2d 372,376 (8th Cir. 1981) (citing Greene case for proposition that confrontation and cross-examination is required before federal employee can be terminated). Indeed, the Supreme Court has, in dicta, stated that confrontation and cross-examination "are essential ... where the person may lose his job in society." Wolff v. McDonnell, 418 U.S. 539,567 (1974)(citing Greene case). How liberally a court will construe the language of the Greene case (concerning rights of confrontation and cross-examination) probably will turn on the particular facts of the case before the court, as well as the perceived equities. At a minimum, it should be assumed that the court will be more inclined to find a right of confrontation and cross-examination when the Government seeks to deny or revoke a security clearance on the basis of the statements of a third party and the affected person denies the truth or accuracy of those third party statements. See, Doe v. U.S. Civil Service Commission, 483 F.Supp. 539,579-580 (S.D.N.Y. 1980)(right of cross-examination where derogatory charges are based on statements by third parties). And, in any event, the Government will have a heavy burden of convincing a court that the noble sentiments expressed in the Greene case are not applicable to security clearance determinations. Absent a rigorous analytical approach, supported by abundant case law and cogent reasoning, the Government will have little chance of convincing a court that the principles articulated by the Supreme Court in the Greene case do not or should not apply to security clearance cases under a new system or Executive Order.

Emilio Jaksetic
Hearing Examiner

Chapter 5

A Comparison and Summary Of The Legal Analyses

The original Statement of Work from PERSEREC presented to the two private attorneys, Mr. John Norton Moore and Mr. Ronald Plesser, identified the objective of the project as:

> Determine whether the current due process afforded DoD personnel is adequate under the Constitution and to make recommendations regarding that due process necessary to meet the requirements of Constitutional law, the DoD Personnel Security Program and the rights of the individual.

The studies from the two civilian attorneys, Mr. Moore and Mr. Plesser, Mr. Emilio Jaksetic, a DISCR hearing examiner, and Mr. Gregory P. Chavez, Air Force personnel security specialist and intern assigned to DUSD(P), address this issue, examining the problem from differing perspectives.

Mr. Moore divides the work into due process rights enumerated in the First, Fifth and Fourteenth Amendments to the U.S. Constitution. Case law is discussed as it applies to each category of defense employee. Mr. Plesser, on the other hand, addresses the issues from a broader perspective regarding the meaning of due process and adds an appendix on security clearances.

Working from an internal Defense Department perspective, Mr. Jaksetic focuses on the issue of property and liberty interests which adds balance to the study and poses several thoughtful considerations. Though all three reports used the same body of case law for their analysis, case selection and interpretation differ slightly. In the case of Mr. Jaksetic, who prepared his analysis separately, a different set of issues arise.

Mr. Chavez focuses on the specific issue of rights of members of the military when derogatory information is uncovered. His paper, presented as an appendix to this report, is summarized in this chapter.

This summary of similarities and differences among the three analyses merges their individual recommendations, and lists implications for policy makers. Structure is provided by the four questions cited in the statement of work which directed Messrs. Moore and Plesser.

Property and Liberty Rights

"Where do the courts stand on the issue of security clearances and property/liberty rights?"

Greene v. McElroy Precedent

All analyses cite the Greene v. McElroy case heard by the United States Supreme Court in 1959. Greene has been broadly interpreted to have established the fundamental principle that fairness (due process) requires that an individual cannot be denied a security clearance without an opportunity to confront his or her accusers and to cross-examine those informants.

As Mr. Plesser points out, the Court's decision favoring Greene was based on three factors:

1. The security clearance program and the procedures it utilized were established by various directives from the Department of Defense and the service branches. "None was the creature of statute or of an Executive Order issued by the President."

2. The loss of the security clearance resulted in the termination of the engineer's employment with the civilian contractor and, as a practical matter, resulted in foreclosing the opportunity of continued activity in his chosen profession.

3. The government did not disclose to the engineer the evidence upon which its decision was based or afford him an opportunity to confront and, by cross-examination, test the testimony against him.

Despite the fact that Greene deliberately does not answer the question of the presence of liberty or property rights in a security clearance, the courts in several instances seem to assume that a decision addressing due process procedures implies such rights. Mr. Jaksetic makes a strong point that "...the Due Process Clause is triggered only when a liberty or property interest is implicated," not the other way around. Nevertheless, the case looms large as one which will continue to influence security clearance issues for many decades. In fact the Greene case led to the issuance of Executive Order 10865 by President Eisenhower specifically spelling out procedural rights due individuals in government or contract service when adverse clearance actions are involved. Current DISCR procedures have their foundation in Greene and the subsequent Executive Order.

Since Greene, the courts have ruled in a number of security clearance-related cases as to the adequacy of due process afforded claimants and, in some instances,

have directly addressed issues of property and liberty rights. In many of the cases cited, however, the existence of claimant rights seems to have been assumed or implied, and the focus of adjudication concentrates on examining the procedures followed by the government agency. The central issue decided has often been whether the procedures provided the claimant adequately safeguarded these rights. A key element in many of these decisions has been the balancing of individual rights against that of the government to protect government security. Mr. Moore makes the generalization "... that the more open the field of employment involved, the more restricted the denial of security clearance, and the less likely it is to be seen as a 'badge of disloyalty or infamy,' the fewer due process procedures are required by the courts."

Property Interests. Mr. Plesser states that the courts have held that the origin of property rights "...is defined by existing rules or understandings that stem from an independent source such as state law." These "understandings" do not have to be written, but may be based upon common or historical practice or any other relevant circumstances. This would seem to open wide the door of jurisdictional interpretation and raise a flag of caution for the government. In particular with civilian contractor personnel, either company practices, labor contracts or other accepted industry standards may create circumstances leading to property rights. All three studies make the general point that a finding of property interest in a security clearance will not be based upon some easily applied "rule of law," but rather on a comprehensive examination of the context of the case, the actual injury suffered by the claimant and the circumstances of employment. The courts have been reluctant to distinguish between the property interest held by a security clearance and the "underlying employment opportunity to which the clearance attaches."

Liberty Interests. Both Mr. Jaksetic and Mr. Plesser address the four circumstances necessary to implicate a liberty interest. They are:

1. The government must make defamatory or stigmatizing charges against the individual.

2. The charges must be disputed by the individual.

3. The charges are "publicized".

4. As a result of the publication of the false and stigmatizing charges, the individual is foreclosed from taking advantage of other employment opportunities or exercising some other legal right.

In their subsequent review of the case law Mr. Jaksetic and Mr. Plesser reveal how the courts have variously interpreted circumstances and, as a result, have further

defined the meaning of such operational terms as defamatory, stigmatizing, publication, etc. A careful reading of the body of law concerning liberty interest gives clear indication of the recent evolution of court interpretation and raises serious implications for government policy makers.

Mr. Jaksetic applies the liberty interest requirements to United States Department of the Navy, Petitioner v. Thomas V. Egan, and concludes that the Federal Circuit Court erred in its finding that a liberty interest was implicated, since Egan did not contest the accuracy of the charges against him and only sought to explain or mitigate his conduct.

Mr. Plesser argues persuasively that, in almost every case, the denial or revocation of a security clearance meets the tests for liberty interest implication. Mr. Jaksetic develops an especially balanced analysis of the case law and draws a similar conclusion. He does differentiate between civilian contractor personnel and both military personnel and federal employees, stating:

> it is likely that the courts will not find that the requirement of "stigma plus" is satisfied by denial or revocation of a security clearance in cases involving military personnel or federal employees so long as the individual involved is not terminated from military service or federal employment as a result of the adverse security clearance determination.

Minimum Requirements

"What are the minimum requirements for due process for DOD civilian employees, civilian employees of government contractors and military personnel in cases involving revocation or denial of security clearances?"

Mr. Plesser and Mr. Jaksetic both base their analysis of this question on the three broad criteria for determining adequate due process adopted by the Court in Matthews v. Eldridge. They are:

1. The private interest that will be affected by the official action.

2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.

3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The reviewed cases appear to depend heavily on establishing this balance of interests and, at least implicitly, to search for that combination of procedures that best fit the court's understanding of fairness. As the court stated in Cafeteria and Restaurant Workers Union Local 473 v. McElroy, "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

Mr. Jaksetic cites numerous cases in developing a four-point description of what due process is and is not:

> Due process is not a technical conception with a fixed content unrelated to time place and circumstances; rather, due process is flexible and depends on the given situation.
>
> Procedural due process in the context of administrative decisions does not always require application of the judicial model.
>
> Due process does not always require a full evidentiary hearing.
>
> Under certain circumstances, a hearing on written materials only is sufficient to satisfy the Due Process Clause.

Due process, then, is not fixed, but rather depends on context, circumstance and, in the case of civilian employees of defense contractors, may depend upon contractual arrangements in force. To guarantee that an individual has been given due process in clearance denials, revocations and suspensions, the government must show a rational nexus between the governmental function involved and private interests affected by government actions. The rational nexus constitutes an additional balancing test. The Greene case requires that the nexus be established without resort to arbitrary or discriminatory procedures. For civilian government and for civilian employees of defense contractors, there is an added requirement: adverse clearance action must be supported by regulation and provide for adequate disclosure of sources of derogatory information.

Mr. Plesser pays particular attention to the hearing as a part of the required process. Certainly, the hearing is the most costly of the procedures currently in use

within DoD. Thus, the timing and extent of hearing rights provided in the case of security clearance revocation or denial becomes pivotal.

Citing Loudermill and Arnett v. Kennedy, Mr. Plesser declares that a full evidentiary hearing is not required before the employee is removed from the position. However, notice of both the charges and the substance of the relevant supporting evidence, and some meaningful opportunity to contest the charges is required. "Meaningful" is defined as "...short of a full evidentiary hearing...."

In summary, though the specific procedures followed by DoD have not been the subject of a direct ruling, Mr. Moore points out that the courts have looked favorably on procedures that afford an opportunity for confrontation and cross-examination of witnesses in connection with security clearance hearings. Other related due process concerns are issues of adequate notice, written charges and the right to reply and appeal. Mr. Plesser is particularly adamant on the question of notice. He cites Executive Order 10865 and the implementing DoD Directive (5220.6) as the only directives which approach Constitutional minimums in this regard.

Mr. Chavez comments that the dearth of case law on military member due process does not and should not imply that members of the Armed Forces are somehow exempt from the constitutional guarantees that are afforded. He points to the dichotomy between the commander's prerogative and the fundamental fairness to an individual. Citing the the commander's prerogative to remove individuals from duties in the face of adverse information, Mr. Chavez comments that this authority, in itself, does not relieve the commander of his or her duty to treat the individual fairly. He correctly points out that even allegations are often powerful enough to end a military career, and that care must be taken to ensure that innuendo do not supplant facts in any adverse action.

While there is no right to a military career, there is a fundamental right to due process that applies to all members of the Department of Defense. Mr. Chavez makes this clear in his analysis, included as an appendix to this report. In one case, however, the issue of due process and constitutional rights was addressed obliquely by correctly stating that "...a security clearance is not a prerequisite for promotion in the Army...." While this may be true, in general, for all the services, it does not address the matter of the harm that may occur to the career professional who is denied a higher clearance or, suffers a clearance revocation. While service administrative procedures provide some safeguards in such circumstances, it is not inconceivable that such an issue may be brought before the courts in the future and that the questions may have the familiar ring of Greene, Matthews, Peters, et al.

Constitutional Adequacy

"How well do current DOD due process provisions meet constitutional requirements?"

It is the opinion of the attorneys that current Defense Department regulations and provisions in their written form satisfy due process requirements, but they caution that implementation perceived as faulty may result in legal challenges. Mr. Moore states that "...since the issuance of the directive [5220.6],...no provision of the directive has been found to fail constitutional scrutiny."

However, he continues, "Rather, in those cases in which courts have overturned findings on security clearances, it has been the implementation of the directive which has been at fault."

In a similar stance, Mr. Plesser sees the principal issue of due process as one involving liberty rights. His analysis is clear on this point: only civilian contractor employees are assured by directive or Executive Order that hearing rights give a meaningful opportunity to be heard. He does not argue that a full evidentiary hearing is always required, and cites examples. He does specifically state that "Executive Order 10865, as implemented by Directive 5220.6, has struck an appropriate balance..." between individual and government interests.

Manner and timing of notice of adverse action and the lack of a right to appeal beyond the agency head appears to be Mr. Plesser's primary concern with DCID 1/14 and DoD Directive 5200.2-R. While the Egan case may have settled this issue by separating the national security and other appeal tracks available to a claimant, a careful examination of his reasoning in this aspect of the law is encouraged.

Implications

What are the Implications for DoD Policy Makers?

Each of the opinions calls attention to the Greene precedent. The Jaksetic paper specifically cautions that any new regulation must address the due process requirements outlined in that case. Mr. Plesser agrees, stating that procedural requirements, as embodied in Greene and codified in Executive Orders and regulations within Defense, must be kept alive, or the court will strike them down.

Mr. Moore states that cases since Greene v. McElroy have shown that the Defense Department's standards for due process are constitutionally adequate, but that errors and problems arise in implementation of those directives.

Mr. Moore also states that different standards for different classes of employees may be a potential problem. He states that institution of additional pre-screening measures before granting clearance -- when coupled with adequate due process safeguards at time of suspension, revocation, or denial -- pass the court test for due process. He argues that military personnel may require institution of an appellate hearing with cross-examination and confrontation rights to bring military personnel to a par with civilian counterparts. He notes, however, that this issue has not been tested or even filed with the courts.

Mr. Chavez would agree, citing what he saw as a confusion and even defensiveness on the part of legal professionals concerning due process rights afforded members of the military. Chavez noted the confusion in some minds concerning the commander's prerogative when in opposition to due process rights. Absent case law, many professionals apparently feel that the commander's judgment holds at all costs.

While these findings involve specific rights of individuals to due process in matters where their security clearance is being suspended, denied, or revoked, it is also important to note the larger context. There is no constitutional right to a security clearance as emphasized in the Egan decision and, therefore, an individual's rights cannot be violated by withholding access to classified information. This means that merely meeting criteria for clearance does not automatically grant a right to access to classified information. Defense Department Directive 5200.2-R is specific in this regard, stating that any doubts must be resolved in favor of national security.

The adverse action to deny or revoke a clearance may be stigmatizing in its own right, but it does not automatically invoke the stigma-plus doctrine mentioned by the courts in Greene. Mr. Plesser argues that as a practical matter adverse clearance action is a badge of dishonor, inferring that clearance possession may be a badge of honor. As the Egan decision makes clear, security clearances are granted based on assessments of individual trustworthiness, and may be revoked when, in the opinion of the granting agency, the trustworthiness of the individual lessens to an unacceptable degree. If the government can prove the allegations of a worsening in trustworthiness, and if due process rights are observed, the badge of honor issue will not apply, and the constitutional requirements for due process have been met.

Summary Comments

Mr. Jaksetic makes four specific recommendations as a result of his analysis of due process issues:

1. Conduct further study of the procedures for granting, denying or revoking security clearances for each of the classes of personnel.

2. Investigate the practical economic consequences of security clearance denial or revocation--for both individuals and government contractors.

3. Study the fiscal and administrative impacts on the government--for current security clearance programs, as well as the impact of possible future modifications.

4. Perform additional legal research on several points raised by the analysis. Mr. Jaksetic's paper lists the areas to be considered.

Mr. Moore offers the following comments and recommendations:

1. An analysis of relevant court cases indicates that the policies formulated by DoD in regard to security clearances since Greene have generally been found to pass constitutional muster.

2. Recent innovations and social changes, in particular the use of polygraph and drug tests, have implications for due process in security clearance matters. Mr. Moore does not recommend major changes, but cautions that the situation must continue to be closely monitored.

3. Thought needs to be given to ways DoD due process policies may be consistently and correctly implemented. Training, education and policy directives are areas for possible review.

4. Equal protection problems may be raised by the use of different due process procedures for different classes of employees, if such differences cannot be justified.

Mr. Moore also makes several specific recommendations for enhancing the constitutionality of the current directives. He suggests among other improvements and modifications that the regulation for contractor personnel could be broadened to include medical tests and non-psychiatric evaluations. He also suggests that current regulations

discriminate among classes of employees and thus separation must be justified to maintain due process.

Mr. Plesser bases his summary comments on the premise that uniform due process is desired for all classes of personnel involved in government work requiring security clearances.

1. Uniform procedures must seek the highest level of protection likely to be required.

2. The denial or revocation of a security clearance will have an adverse impact on a person's current or future employment opportunities in almost all cases.

3. Nothing in a revised Executive Order can diminish the requirements imposed by Congress under the CSRA.

4. Even if there are cases where no property rights are at issue, any denial or revocation of a security clearance may implicate liberty interests.

5. From a legal and a policy perspective, any uniform procedure must assume that the denial or revocation of a security clearance will always implicate property and liberty interests.

6. As a practical matter, it will be difficult to establish a uniform set of procedures that does not provide at least the protection set forth in 5 U.S.C. paras. 7513 and 7532.

7. "While due process is not rigid formula to be applied, the Constitution does require that fundamental fairness be provided. As a matter of public policy, much less Constitutional imperative, we think DoD should be loath to abandon the procedural protection considered rudimentary to fundamental fairness by the Supreme Court almost 30 years ago in Greene v. McElroy and adopted by President Eisenhower in Executive Order 10865."

Mr Chavez makes the following summary comments:

1. Military personnel are guaranteed due process under the constitution and applicable DoD Directives and Regulations.

2. While military commanders, under the provisions of DoD Directive 5200.2-R, have the **authority** to temporarily suspend a military member's access to clas-

sified information, they do not have the authority to reassign a military member **for security reasons** outside the organization to which the member is assigned.

3. The military commander is further enjoined from removing the member from the organization until the security allegations have been adjudicated by the component central adjudication facility.

4. The critical issue is the definition of an adverse action: A suspension of classified access is not, in itself, an adverse action. A security clearance revocation or reassignment to a position with less sensitive duties, are in fact adverse actions.

Acronyms

ACSI	Assistant Chief of Staff for Intelligence, US Army
CCF	Central Clearance Facility
CO	Commanding Officer
CSRA	Civil Service Reform Act
DCI	Director of Central Intelligence
DCID	Director of Central Intelligence Directive
DIS	Defense Investigative Service
DISCO	Defense Industrial Security Clearance Office
DISCR	Directorate for Industrial Security Clearance Review
DISP	Defense Industrial Security Program
DOD	Department of Defense
LOI	Letter of Intent
MSPB	Merit System Protection Board
NAC	National Agency Check
NACI	National Agency Check with Inquiries
OACSI	See ACSI, above
ODCSPER	Office of the Deputy Chief of Staff, Personnel
OSA	Office of the Secretary of the Army
OTJAG	Office of the Judge Advocate General
PIC	Personnel Investigation Center
PSI	Personnel Security Investigation
SCI	Sensitive, Compartmented Intelligence
SA	Special Assistant
SO	Security Officer
SOR	Statement of Reasons
UCMJ	Uniform Code of Military Justice
USG	United States Government

References

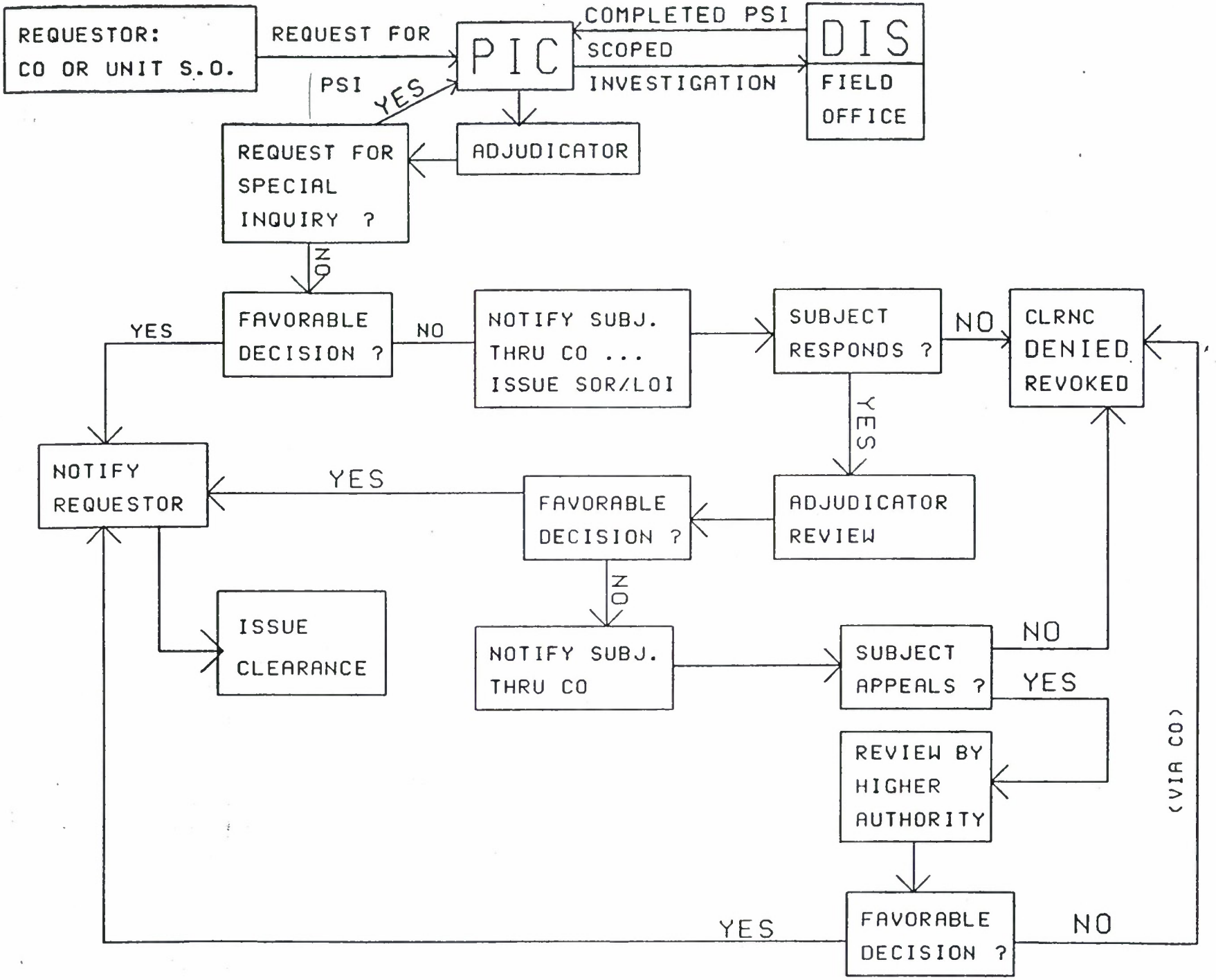
Brant, Irving. (1965) The Bill of Rights. Indianapolis: Bobbs, Merrill.

Small, Norman J. (Ed.) (1964) The Constitution of the United States of America, analysis and interpretation. Washington: United States Government Printing Office.

List of Appendixes

Appendix A

DoD Adjudication Flow Chart

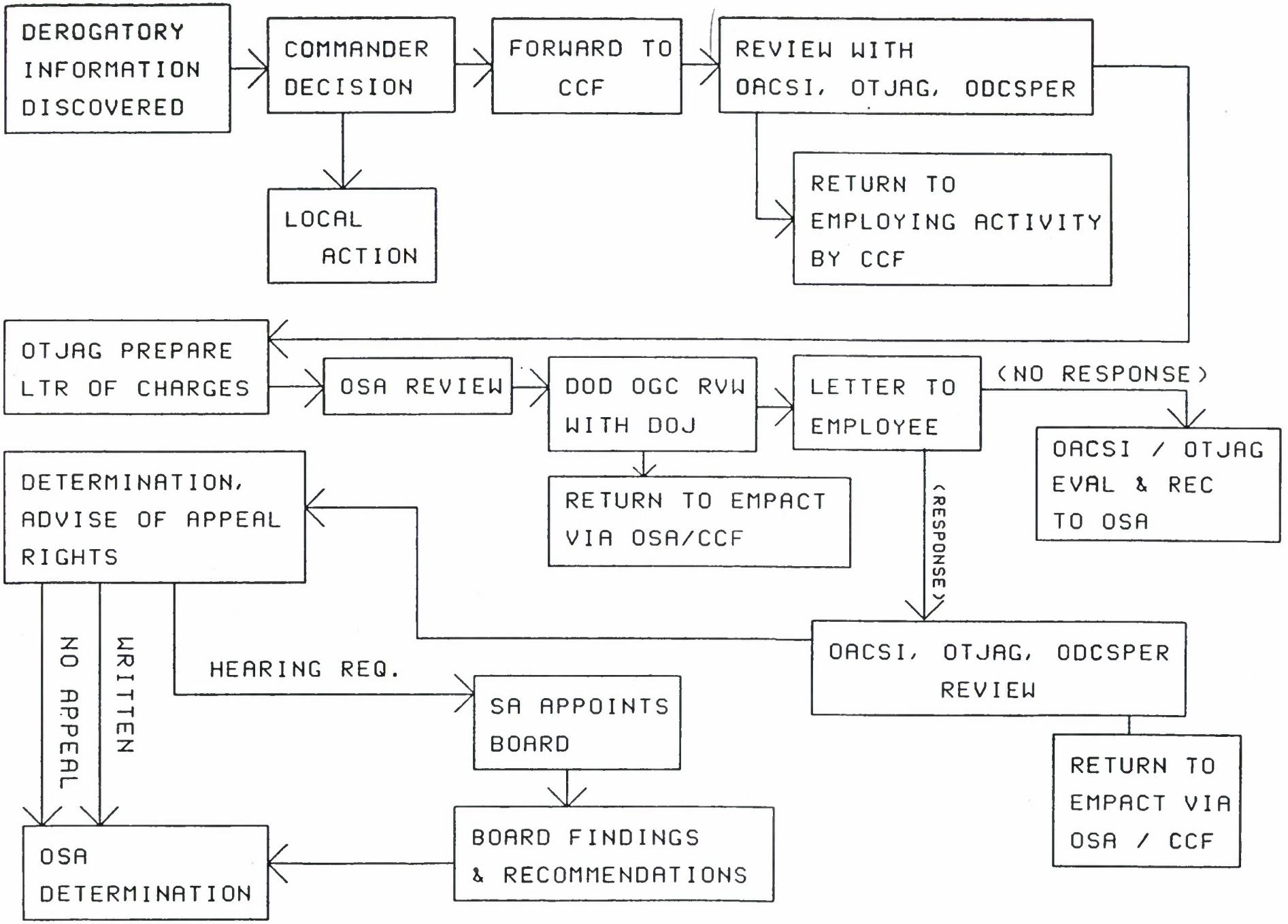


APPENDIX A

DOD CIVILIAN/MILITARY ADJUDICATION PROCESS

Appendix B

Army Regulation 604-5 Process Flow Chart

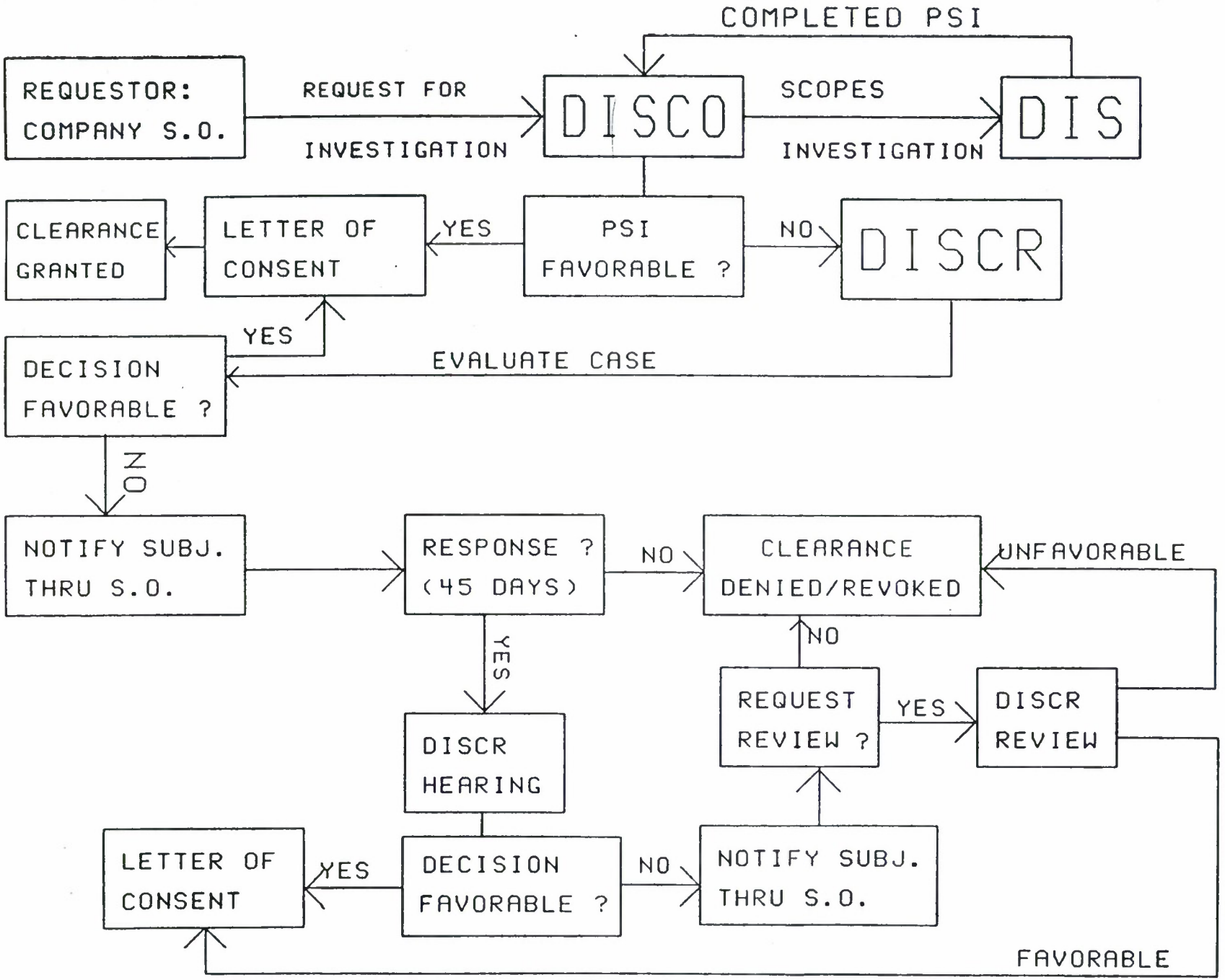


AR 604-5 PROCESS

APPENDIX B

Appendix C

DISCR Adjudication Flow Chart



DISCR ADJUDICATION PROCESS

APPENDIX C

Appendix D

Department of the Navy, Petitioner versus Thomas E. Egan

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF THE NAVY *v.* EGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 86–1552. Argued December 2, 1987—Decided February 23, 1988

Title 5 U. S. C., Ch. 75, provides a "two-track" system for undertaking "adverse actions" against certain Government employees. An employee removed for "cause," §§ 7511–7514, has a right of appeal to the Merit Systems Protection Board (Board), § 7513(d), that includes a hearing. The Board reviews such removals under a preponderance of the evidence standard. § 7701. An employee is also subject to summary removal based on national security concerns. Such a removal is not appealable to the Board, but the employee has certain specified procedural rights, including a hearing by an agency authority. § 7532. Respondent was removed from his laborer's job at a submarine facility after the Navy denied him a required security clearance. Without a security clearance, respondent was not eligible for any job at the facility. Upon respondent's appeal of his removal under § 7513(d), the Board's presiding official reversed the Navy's decision, holding that the Board had the authority to review the merits of the underlying security-clearance determination and that the Navy had failed to show that it reached a reasonable and warranted decision on this question. The full Board reversed and sustained the Navy's removal action, but the Court of Appeals reversed and remanded, holding that, since the Navy had chosen to remove respondent under § 7512 rather than § 7532, review under 7513 applied, including review of the merits of the underlying security-clearance determination.

Held: In an appeal pursuant to § 7513, the Board does not have authority to review the substance of an underlying security-clearance determination in the course of reviewing an adverse action. Pp. 8–15.

(a) The grant or denial of security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate Executive Branch agency having the necessary expertise in protecting classified information. It is not reason-

ably possible for an outside, nonexpert body to review the substance of such a judgment, and such review cannot be presumed merely because the statute does not expressly preclude it. Pp. 8–11.

(b) The statute's express language and structure confirm that it does not confer broad authority on the Board to review security-clearance determinations. A clearance denial is not one of the enumerated "adverse actions" that are subject to Board review, and nothing in the Act directs or empowers the Board to go beyond determining whether "cause" for a denial existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. The application of § 7701's preponderance of the evidence standard to security-clearance determinations would inevitably alter the "clearly consistent with the interests of the national security" standard normally applied in making such determinations and would involve the Board in second-guessing an agency's national security determinations, a result that it is extremely unlikely Congress intended. Respondent's argument that the availability of the alternative § 7532 summary removal procedure compels a conclusion of reviewability, since an anomalous situation would otherwise exist whereby the more "drastic" § 7532 remedy would actually entitle a removed employee to greater procedural protections—particularly to a preremoval trial-type hearing—than would § 7513, is unpersuasive. Section 7532 provides a procedure that is harsh and drastic both for the employee and for the agency head, who must act personally in suspending and removing the employee, and removal thereunder, even as envisioned by respondent, would not have amounted to "more" procedural protection than respondent received under § 7513. The procedures under the two sections are not anomalous, but merely different. Pp. 11–15.

802 F. 2d 1563, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined. KENNEDY, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 86–1552

DEPARTMENT OF THE NAVY, PETITIONER *v.* THOMAS E. EGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 23, 1988]

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent Thomas M. Egan lost his laborer's job at the Trident Naval Refit Facility in Bremerton, Wash., when he was denied a required security clearance. The narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. The Board ruled that it had no such authority. The Court of Appeals for the Federal Circuit, by a divided vote, reversed. We granted certiorari because of the importance of the issue in its relation to national security concerns. —— U. S. —— (1987).

I

Respondent Egan was a new hire and began his work at the facility on November 29, 1981. He served as a veteran's-preference-eligible civilian employee of the Navy subject to the provisions of the Civil Service Reform Act of 1978 (Act), § 202, 92 Stat. 1121, 5 U. S. C. § 1201 *et seq.*

The mission of the Refit Facility is to provide quick-turnaround repair, replenishment, and systems check-out of the Trident submarine over its extended operating cycle. The Trident is nuclear-powered and carries nuclear weapons. It has been described as the most sophisticated and sensitive

weapon in the Navy's arsenal and as playing a crucial part in our Nation's defense system. See *Concerned About Trident* v. *Schlesinger*, 400 F. Supp. 454, 462–466 (DC 1975), modified, 180 U. S. App. D. C. 345, 555 F. 2d 817 (1977). As a consequence, *all* employee positions at the Refit Facility are classified as sensitive. Thus, as shown on his Standard Form, a condition precedent to Egan's retention of his employment was "satisfactory completion of security and medical reports."

In April 1982, respondent gained the "noncritical-sensitive" position of labor leader.[1] Pending the outcome of his security investigation, however, he performed only limited duties and was not permitted to board any submarine.

On February 16, 1983,[2] the Director of the Naval Civilian Personnel Command issued a letter of intent to deny respondent a security clearance. This was based upon California and Washington state criminal records reflecting respondent's convictions for assault and for being a felon in possession of a gun, and further based upon his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. The Navy also referred to respondent's own statements that he had had drinking problems in the past and had served the final 28 days of a sentence in an alcohol rehabilitation program.

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[1] A "noncritical-sensitive" position is defined to include "[a]ccess to Secret or Confidential Information." Chief of Naval Operations Instructions (OPNAVINST) 5510.1F, ¶16–101–2.b (June 15, 1981). OPNAVINST 5510.1F was amended in April 1984 and is now OPNAVINST 5510.1G.

[2] This date is of some significance for by then respondent had been employed at the facility for more than a year. Title 5 U. S. C. § 7511(1)(A) defines an "employee" as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less." There is no dispute concerning respondent's status as an employee within the meaning of § 7511(1)(A).

Respondent was informed that he had a right to respond to the proposed security-clearance denial. On May 6, he answered the Navy's letter of intent, asserting that he had paid his debt to society for his convictions, that he had not listed convictions older than seven years because he did not interpret the employment form as requiring that information, and that alcohol had not been a problem for him for three years preceding the clearance determination. He also provided favorable material from supervisors as to his background and character.

The Director, after reviewing this response, concluded that the information provided did not sufficiently explain, mitigate, or refute the reasons on which the proposed denial was based. Accordingly, respondent's security clearance was denied.

Respondent took an appeal to the Personnel Security Appeals Board, but his removal was effected before that board acted (which it eventually did by affirming the denial of clearance).

Without a security clearance, respondent was not eligible for the job for which he had been hired. Reassignment to a nonsensitive position at the facility was not possible because there was no nonsensitive position there. Accordingly, the Navy issued a notice of proposed removal, and respondent was placed on administrative leave pending final decision. Respondent did not reply to the notice. On July 15, 1983, he was informed that his removal was effective July 22.

Respondent, pursuant to 5 U. S. C. § 7513(d), sought review by the Merit Systems Protection Board.[3] Under § 7513(a), an agency may remove an employee "only for such cause as will promote the efficiency of the service." The statute, together with § 7701 to which § 7513(d) specifically refers, provides the employee with a number of procedural

[3] Section 7513(d) reads: "An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title."

protections, including notice, an opportunity to respond and be represented by counsel, and a decision in writing. The employee, unless he is a nonveteran in the excepted service, may appeal the agency's decision to the Board, as respondent did, which is to sustain the action if it is "supported by a preponderance of the evidence." § 7701(c)(1)(B).[4] The stated "cause" for respondent's removal was his failure to meet the requirements for his position due to the denial of security clearance. Before the Board, the Government argued that the Board's review power was limited to determining whether the required removal procedures had been followed and whether a security clearance was a condition for respondent's position. It contended that the Board did not have the authority to judge the merits of the underlying security-clearance determination.

The Board's presiding official reversed the agency's decision, ruling that the Board did have authority to review the merits. She further ruled that the agency must specify the precise criteria used in its security-clearance decision and must show that those criteria are rationally related to national security. App. to Pet. for Cert. 62a–63a. The agency then must show, by a preponderance of the evidence, that the employee's acts precipitating the denial of his clearance actually occurred, and that his "alleged misconduct has an actual or potentially detrimental effect on national security interests." *Id.*, at 63a. The official then held that the ultimate

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[4] We note at this point the presence of 5 U. S. C. § 7532. Under § 7532(a), the "head of an agency," "[n]ot withstanding other statutes," may suspend an employee "when he considers that action necessary in the interests of national security." After complying with specified procedures, the agency head may remove the suspended employee when "he determines that removal is necessary or advisable in the interests of national security." His determination then is "final." § 7532(b). Removal under § 7532 is not subject to Board review. § 7512(A). In respondent's case the Navy did not invoke § 7532; his removal, therefore, presumably would be subject to Board review as provided in § 7513.

burden was upon the agency to persuade the Board of the appropriateness of its decision to deny clearance. *Id.*, at 64a.

The official concluded that it was not possible to determine whether the Navy's denial of respondent's security clearance was justified because it had not submitted a list of the criteria it employed and because it did not present evidence that it had "conscientiously weighed the circumstances surrounding [respondent's] alleged misconduct and really balanced it against the interests of national security." *Id.*, at 65a. She accordingly concluded that the Navy had "failed to show it reached a reasonable and warranted decision concerning the propriety of the revocation of [respondent's] security clearance." *Id.*, at 66a. The decision to remove respondent, therefore, could not stand.

The Navy petitioned for full Board review of the presiding official's ruling.[5] In a unanimous decision, the Board reversed the presiding official's ruling and sustained the agency's removal action. 28 M. S. P. B. 509 (1985). It observed that §§ 7512 and 7513 "do not specifically address the extent of the Board's review of the underlying determinations." 28 M. S. P. B., at 514. Neither did the legislative history of the Act "address the extent of the authority Congress intended the Board to exercise in reviewing revocations or denials of security clearances which result in Chapter 75 actions." *Id.*, at 515. The Board found no binding legal precedent. It acknowledged the presence of the decision in *Hoska* v. *Department of the Army*, 219 U. S. App. D. C. 280, 677 F. 2d 131 (1982) (security clearance revocation leading to dismissal reviewed on its merits), but explained that case

[5]The Solicitor General informs us, see Brief for Petitioner 6, that the Board had before it numerous petitions for review raising similar issues of law, and treated the present litigation as the lead case. The Board had invited and received briefs from interested agencies, employee organizations, and others concerning the proper scope of its review and whether § 7532, see n. 4, *supra*, is the exclusive authority for a removal based upon national security concerns. See 49 Fed. Reg. 48623–48624 (1984); 50 Fed. Reg. 2355 (1985).

away on the ground that the court did not "expressly address the Board's authority to review the underlying reasons for the agency's security clearance determination." 28 M. S. P. B., at 516. Thus, earlier Board cases that had relied upon *Hoska*, see, *e. g.*, *Bogdanowicz* v. *Department of the Army*, 16 M. S. P. B. 653 (1983), involved a "reliance misplaced," and the holding that they stood "for the proposition that the Board has the authority to review the propriety of the agency's . . . denial of a security clearance" was "now overrule[d]." 28 M. S. P. B., at 516. It went on to say that "section 7532 is not the exclusive basis for removals based upon security clearance revocations." *Id.*, at 521.

Respondent, pursuant to § 7703, appealed to the Court of Appeals for the Federal Circuit. By a divided vote, that court reversed the Board's decision that it had no authority to review the merits of a security-clearance determination underlying a removal. 802 F. 2d 1563 (1986). It agreed with the Board that § 7532 is not the sole authority for a removal based upon national security concerns. 802 F. 2d, at 1568. It noted, however, that the agency had chosen to remove respondent under § 7512 rather than § 7532 and thus that it chose the procedure "that carried Board review under section 7513," 802 F. 2d, at 1569, including review of the merits of the underlying agency determination to deny a security clearance. The court then remanded the case to the Board for such review, stating that the question of an appropriate remedy, should the Board now rule that a security clearance was improperly denied, was not yet ripe. *Id.*, at 1573–1575.

The dissenting judge in the Court of Appeals concluded that respondent had received all the procedural protections to which he was entitled, *id.*, at 1577–1578; that the majority in effect was transferring a discretionary decision vested in an executive agency to a body that had neither the responsibility nor the expertise to make that decision; that the ruling raised separation-of-powers concerns; and that the Board

would be unable to provide an appropriate remedy. *Id.*, at 1578, 1580–1583.

II

We turn first to the statutory structure. Chapter 75 of Title 5 of the United States Code is entitled "Adverse Actions." Its subchapter II (§§ 7511–7514) relates to removals for "cause." Subchapter IV (§§ 7531–7533) relates to removals based upon national security concerns. An employee removed for "cause" has the right, under § 7513(d), to appeal to the Board. In contrast, an employee suspended under § 7532(a) is not entitled to appeal to the Board. That employee, however, is entitled to specified preremoval procedural rights, including a hearing by an agency authority. § 7532(c)(3).

Chapter 77 of Title 5 (§§ 7701–7703) is entitled "Appeals," and Chapter 12 (§§ 1201–1209) relates to the "Merit Systems Protection Board and Special Counsel." Section 1205(a) provides that the Board shall "hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board" and shall "order any Federal agency or employee to comply with any order or decision issued by the Board." In the present litigation, there is no claim that the Board did not have jurisdiction to hear and adjudicate respondent's appeal.

It is apparent that the statutes provide a "two-track" system. A removal for "cause" embraces a right of appeal to the Board and a hearing of the type prescribed in detail in § 7701. Suspension and removal under § 7532, however, entail no such right of appeal. Respondent takes the straightforward position that, inasmuch as this case proceeded under § 7513, a hearing before the Board was required. The Government agrees. What is disputed is the subject matter of that hearing and the extent to which the Board may exercise reviewing authority. In particular, may the Board, when § 7513 is pursued, examine the merits of the security-clearance denial, or does its authority stop short of that

point, that is, upon review of the fact of denial, of the position's requirement of security clearance, and of the satisfactory provision of the requisite procedural protections?

III

The Court of Appeals' majority stated: "The absence of any statutory provision precluding appellate review of security clearance denials in section 7512 removals creates a strong presumption in favor of appellate review," citing *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). 802 F. 2d, at 1569. One perhaps may accept this as a general proposition of administrative law, but the proposition is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U. S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 890 (1961). This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980). See also *United States* v. *Robel*, 389 U. S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U. S. 1, 10 (1953); *Totten* v. *United States*, 92 U. S. 105, 106 (1875). The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity. See "Developments in the Law—The National Security Interest and Civil Liberties," 85 Harv. L. Rev. 1130, 1193–1194 (1972). After World War II, certain civilian agencies, including the Central Intelligence Agency, the National Security Agency, and the Atomic Energy Commission, were entrusted with gathering, protecting, or creating information bearing on national security. Presidents, in a series of executive orders, have sought to protect sensitive information and to ensure its proper classification throughout the Executive Branch by delegating this responsibility to the heads of agencies. See Exec. Order No. 10290, 3 CFR 790 (1949–1953 Comp.); Exec. Order No. 10501, 3 CFR 979 (1949–1953 Comp.); Exec. Order No. 11652, 3 CFR 154 (1972 Comp.); Exec. Order No. 12065, 3 CFR 190 (1979 Comp.); Exec. Order No. 12356, § 4.1(a), 3 CFR 166 (1982 Comp.). Pursuant to these directives, departments and agencies of the Government classify jobs in three categories: critical sensitive, noncritical sensitive, and nonsensitive. Different types and levels of clearance are required, depending upon the position sought. A Government appointment is expressly made subject to a background investigation that varies according to the degree of adverse effect the applicant could have on the national security. See Exec. Order No. 10450, § 3, 3 CFR 937 (1949–1953 Comp.).

It should be obvious that no one has a "right" to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with the interests of the national security." See, *e. g.*, Exec. Order No. 10450, §§ 2 and 7, 3 CFR 936, 938 (1949–1953 Comp.); 10 CFR § 710.10(a) (1987) (Department of Energy); 32 CFR § 156.3(a) (1986) (Department of Defense). A clearance does not equate with passing

judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic." *Molerio* v. *FBI*, 242 U. S. App. D. C. 137, 146, 749 F. 2d 815, 824 (1984). The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the "grant or denial of security clearances . . . an inexact science at best." *Adams* v. *Laird*, 136 U. S. App. D. C. 388, 397, 420 F. 2d 230, 239 (1969), cert. denied, 397 U. S. 1039 (1970).

Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," *CIA* v. *Sims*, 471 U. S. 159, 170 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." *Cole* v. *Young*, 351 U. S. 536, 546 (1956). As noted above,

this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." *Haig* v. *Agee*, 453 U. S. 280, 293–294 (1981). "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *United States* v. *Nixon*, 418 U. S. 683, 710 (1974). Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. See *e. g.*, *Orloff* v. *Willoughby*, 345 U. S. 83, 93–94 (1955), *Burns* v. *Wilson*, 346 U. S. 137, 142, 144 (1953), *Gilligan* v. *Morgan*, 413 U. S. 1, 10 (1973), *Schlesinger* v. *Councilman*, 420 U. S. 738, 757–758 (1975), *Chappell* v. *Wallace*, 462 U. S. 296 (1983).

We feel that the contrary conclusion of the Court of Appeals' majority is not in line with this authority.

IV

Finally, we are fortified in our conclusion when we consider generally the statute's "express language" along with "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345 (1984).

The Act by its terms does not confer broad authority on the Board to review a security-clearance determination. As noted above, the Board does have jurisdiction to review "adverse actions," a term, however, limited to a removal, a suspension for more than 14 days, a reduction in grade or pay, and a furlough of 30 days or less. §§ 7513(d), 7512. A denial of a security clearance is not such an "adverse action," and by its own force is not subject to Board review. An employee who is removed for "cause" under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clear-

ance was denied, and whether transfer to a nonsensitive position was feasible. Nothing in the Act, however, directs or empowers the Board to go further. Cf. *Zimmerman* v. *Department of the Army*, 755 F. 2d 156 (CA Fed. 1985); *Buriani* v. *Department of the Air Force*, 777 F. 2d 674, 677 (CA Fed. 1985); *Bacon* v. *Dept. of Housing & Urban Development*, 757 F. 2d 265, 269–270 (CA Fed. 1985); *Madsen* v. *Veterans Admin.*, 754 F. 2d 343 (CA Fed. 1985).[6]

As noted above, security clearance normally will be granted only if it is "clearly consistent with the interests of the national security." The Board, however, reviews adverse actions under a preponderance of the evidence standard. § 7701(c)(1)(B). These two standards seem inconsistent. It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the "clearly consistent with the interests of the national security" test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the

[6] Prior to the Act's passage in 1978, most federal employees dismissed for cause could pursue an appeal to the Civil Service Commission. The parties here appear to agree that the old Commission never exercised jurisdiction over a security-clearance determination. We fail to see any indication that Congress intended to grant the Board greater jurisdiction in this respect than that possessed by the Civil Service Commission. The Board was created to assume the adjudicatory functions of the old Commission and, with certain exceptions, those functions passed unchanged from the Commission to the Board. When the Senate and House committees listed the changes effected by the Act, they gave no indication that an agency's security-clearance determination was now to be subject to review. See S. Rep. No. 95–969, pp. 46 and 52 (1978); H. R. Rep. No. 95–1403, pp. 21–22 (1978). Such changes as were made did not bear upon the issue. If there be any contrary implication in the legislative history, as respondent would suggest, it is much too frail for us to conclude that Congress intended a major change of that kind.

Board in second-guessing the agency's national security determinations. We consider it extremely unlikely that Congress intended such a result when it passed the Act and created the Board.

Respondent presses upon us the existence of § 7532 with its provision for an employee's summary removal. The Court of Appeals' majority concluded that § 7532 was not the exclusive means for removal on national security grounds. 802 F. 2d, at 1568.[7] The parties to the present litigation are in no dispute about the alternative availability of § 7513 or § 7532. They assume, as the Federal Circuit held, that § 7532 does not pre-empt § 7513 and that the two statutes stand separately and provide alternative routes for administrative action. There is no reason for us to dispute that conclusion here for, in this respect, we accept the case as it comes to us.

Respondent points out the Government's acknowledgment that the remedy under § 7532 is "drastic" in that the employee may be suspended summarily and thereafter removed after such investigation and review as the agency head considers necessary; in that neither the suspension nor the removal is subject to outside review; in that the employee is not eligible for any other position in the agency and may not be appointed to a position elsewhere in the Government without consultation with the Office of Personnel Management; and in that the section requires the head of the agency to act personally. At the same time, respondent would say, as did the

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[7] But cf. *Doe* v. *Weinberger*, —— U. S. App. D. C. ——, ——, 820 F. 2d 1275, 1280 (1987), cert. pending *sub. nom. Carlucci* v. *Doe*, No. 87-751. If the District of Columbia Circuit's holding in *Doe* (to the effect that § 7532 is not merely "an extra option," 820 F. 2d, at 1280, for the removal of an employee of the National Security Agency, to which 50 U. S. C. §§ 831 and 832 apply) is pertinent with respect to the Navy's power to dismiss an employee for cause under § 7513, that ruling would conflict with the Federal Circuit's holding in the present case that the Navy may proceed under § 7513. This Court will meet the issue in *Doe* when it comes to it. We decide the present case on the parties' assumption that § 7513 was available to the Navy in this case and that it proceeded thereunder.

Court of Appeals, 802 F. 2d, at 1572, that the Board's decision in the present case suggests an anomaly in that an employee removed under § 7513 is entitled to less process than one removed under § 7532. The argument is that the availability of the § 7532 procedure is a "compelling" factor in favor of Board review of a security-clearance denial in a case under § 7513. We are not persuaded.

We do not agree that respondent would have received greater procedural protections under § 7532 than he received in the present case. Respondent received notice of the reasons for the proposed denial, an opportunity to inspect all relevant evidence, a right to respond, a written decision, and an opportunity to appeal to the Personnel Security Appeals Board. Until the time of his removal, he remained on full-pay status. His removal was subject to Board review that provided important protections outlined above. In contrast, had he been removed under § 7532, he would have received notice to "the extent that the head of the agency determines that the interests of national security permit," a hearing before an agency board, and a decision by the head of the agency. He could have been suspended without pay pending the outcome. He would not have been entitled to any review outside the agency, and, once removed, he would have been barred from employment with the agency. In short, § 7532, instead, provides a procedure that is harsh and drastic both for the employee and for the agency head, who must act personally in suspending and removing the employee. See § 7532(a) and (b).

Respondent's argument that the Board's decision in this case creates an anomaly seems to come down to his contention that, had he been removed under § 7532, he would have been entitled to a trial-type hearing prior to his removal. Even assuming he would be entitled to such a hearing under § 7532, however, we would still consider the two procedures not anomalous, but merely different. As explained above, we doubt whether removal under § 7532, even as envisioned

by respondent, would have amounted to "more" procedural protection.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 86–1552

DEPARTMENT OF THE NAVY, PETITIONER *v.*
THOMAS E. EGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 23, 1988]

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

It cannot be denied that the Government has a "compelling interest" in safeguarding the Nation's secrets. See *ante*, at 8. I see no necessity for this Court to rewrite the civil service statutes in the name of national security, however, since those statutes already provide a procedure that protects sensitive information without depriving federal employees such as respondent of a hearing into the underlying reasons for their discharge.

The parties do not dispute that respondent was discharged from his civilian "laborer leader" position with the U. S. Navy pursuant to subchapter II of the Civil Service Reform Act, 5 U. S. C. §§7511–7514. A federal agency may discharge an employee under those statutory provisions "only for such cause as will promote the efficiency of the service." §7513(a). The employee is entitled to appeal the agency's action to the Merit Systems Protection Board. §7513(d). The Board must afford the employee "a hearing for which a transcript will be kept." §7701(a)(1). The employee's discharge is to be sustained by the Board only if "supported by a preponderance of the evidence." §7701(c)(1)(B).

There is nothing in these statutory provisions to suggest that the Board is to scrutinize discharges on national security grounds any less comprehensively than other discharges for

"cause." Nor does the legislative history of these provisions suggest that the Board is foreclosed from examining the reasons underlying the discharges of employees who are alleged to be security risks.

If Congress had remained silent on the subject of national security discharges throughout the Civil Service Reform Act, I might feel compelled to read into the foregoing provisions some restrictions on the scope of Board review of such discharges. It might be appropriate in such circumstances to assume that Congress intended that such restrictions be inferred by the Board and the courts.

Congress did not remain silent, however, with regard to national security discharges. Rather, Congress carefully provided an alternative procedure to be used when the Government determines that an employee's removal is "necessary or advisable in the interests of national security." 5 U. S. C. § 7532(b). The employee is entitled under this procedure to "a written statement of the charges against him," "an opportunity . . . to answer the charges and submit affidavits," "a hearing . . . by an agency authority duly constituted for this purpose," "a review of his case by the head of the agency or his designee," and "a written statement of the decision of the head of the agency." § 7532(c). The decision of the agency head is "final." § 7532(b). It is not disputed that the Navy could have proceeded against respondent under § 7532.

The sensible inference to be drawn from Congress' enactment of the procedural protections of § 7532 for employees discharged "in the interests of national security" and its silence with regard to the procedures applicable to similarly motivated discharges under other sections of the civil service statutes is that Congress intended to guarantee every discharged employee a hearing into the "cause" for his removal. If the employee is discharged under § 7532, he is entitled to a hearing before his own agency; if the employee is discharged

under other provisions of Title 5, he is entitled to a hearing before the Board.

Yet, the majority's decision frustrates this congressional intent by denying any meaningful hearing to employees such as respondent who are discharged on national security grounds under provisions other than § 7532. In such cases, the employing agency has no statutory obligation to afford the employee a hearing, and the Board now need determine only "whether in fact [a security] clearance was denied, and whether transfer to a nonsensitive position was feasible." *Ante*, at 11–12. Hence, the employee cannot demand a hearing into claims that he was branded a security risk based on false allegations or on reasons that lack any rational nexus to national security concerns.

It is difficult to reconcile today's decision with the Court's discussion in *Greene* v. *McElroy*, 360 U. S. 474 (1959), of the procedural protections available to an employee of a government contractor who had been denied a security clearance based on his alleged Communist associations and sympathies:

> "Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Such decisions cannot be assumed by acquiescence or non-action. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Id.*, at 507 (citations omitted).

It is far from clear in the instant circumstances that Congress or the President has decided that discharging alleged security risks without any sort of hearing is "necessary or warranted" or has explicitly authorized such a procedure. Instead, the majority assumes such a result from congressional "non-action." For example, the majority emphasizes that "[n]othing in the [Civil Service Reform] Act . . . directs or empowers to Board to go further" than to determine whether a security clearance was indeed denied and whether transfer to a nonsensitive position was possible. *Ante*, at 12. There is likewise nothing in the Act, however, that directs the Board *not* to "go further."

Today's result is not necessary to protect the Nation's secrets. If an agency fears that the Board will not be sufficiently sensitive to the national security implications of a discharge decision,[1] the agency may foreclose external review

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[1] There is no reason to assume that the Board would be insensitive to national security concerns. It is questionable whether the Board would often have to consider sensitive information in determining whether an agency had cause to discharge an employee on national security grounds. No such information appears to have been at issue in the instant case. Moreover, in those cases in which sensitive information would have to be considered, the Board could be expected to adopt procedures (*e. g.*, *in camera* inspection of classified documents) similar to those utilized by the courts in similar circumstances. It appears that the courts have previously adjudicated cases involving denials of security clearances without any documented harm to national security. See, *e. g.*, *Hoska* v. *United States Department of Army*, 219 U. S. App. D. C. 280, 677 F. 2d 131 (1982); *Gayer* v. *Schlesinger*, 160 U. S. App. D. C. 172, 490 F. 2d 740 (1973); *McKeand* v. *Laird*, 490 F. 2d 1262 (CA9 1973). Finally, given the requirement of Executive Order No. 10450, 3 CFR 937 (1949–1953 Comp.), that security clearances be granted only if "clearly consistent with the interests of the national security," I would assume that the Board's review of national security discharges would be suitably deferential to the employing agency even under the preponderance of the evidence standard prescribed by § 7701(c)(1)(B). It is questionable whether the Board's inquiry into such discharges would be qualitatively different from its inquiry into discharges for other varieties of "cause." The Board routinely evaluates such

of that decision by proceeding against the employee under § 7532. The agency would be required in such circumstances, however, to afford the employee an internal hearing into the reasons for his termination. The agency could not discharge the employee, as the Navy did here, without affording him any hearing into the merits of his discharge.

The majority suggests that respondent would have received no more procedural protection under § 7532 than under § 7513 notwithstanding that he was guaranteed a hearing on the merits under the former provision but not under the latter. *Ante*, at 14–15. This conclusion does not show sufficient regard for our many decisions recognizing the particularly important role of the hearing in assuring that individuals are not wrongfully deprived of their livelihoods or other significant interests. See, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974); *Perry* v. *Sindermann*, 408 U. S. 593, 603 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 652–658 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 269–270 (1970). I cannot assume that the proceedings required under § 7532 would not provide an employee with a meaningful opportunity to be heard simply because they are conducted by an agency authority rather than by the Board.[2]

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factors as loyalty, trustworthiness, and judgment in determining whether an employee's discharge will "promote the efficiency of the service."

[2] The § 7532 procedure is not as "harsh and drastic" as the majority contends to either the employee or the agency head. The majority asserts that, if respondent had been discharged under § 7532, "he would have been barred from employment with the agency." *Ante*, at 14. Respondent, however, could have obtained other employment with the Navy even if he had been discharged under § 7532; the civil service statutes expressly authorize the reinstatement of persons removed under § 7532 "in the discretion of the head of the agency concerned." § 3571. It has never been suggested that the Navy would not rehire respondent for a position that does not require a security clearance. Moreover, while the majority asserts that the agency head "must act personally" to discharge an employee under § 7532, *ante*, at 14, the statute provides for final review of discharge decisions by "the head of the agency *or his designee*." § 7532(c)(3)(D) (emphasis added).

In sum, absent any indication that Congress or the President intended to deny federal employees discharged on national security grounds a full hearing before either the Board or their employing agency into the merits of their removal, I respectfully dissent.

Appendix E

Applicability of Personnel Security Due Process Procedures to Military Members When Derogatory Information is Introduced

Gregory P. Chavez

Applicability of Personnel Security Due Process Procedures to Military Members When Derogatory Information is Introduced

Presented by

Gregory P. Chavez

Spring 1988

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Mr. Chavez wrote this paper at the request of the Department of Defense, Office of the Deputy Under Secretary of Defense for Policy.

INTRODUCTION

The purpose and procedures contained within the Department of Defense (DoD) Personnel Security Program (DoD 5200.2-R) are written with the intent of protecting the national security and helping to preserve the integrity of classified information while not losing sight of the need to provide safeguards protecting the rights and legitimate interests of those subject to the procedures.

Of continuing concern within the DoD Personnel Security Program is the applicability of certain due process related procedures contained in DoD 5200.2-R Chapter VIII, when a personnel security determination is about to be made on a military member (i.e. permanent reassignment from a position with sensitive duties to one with less sensitive duties). Specific concern is focused on the actions taken by a commander when derogatory information about a military member is received and before a final determination on that member's security clearance eligibility is made by a Central Adjudication Facility. As per DoD 5200.2-R procedures, a commander should suspend access until a final decision is made by a Central Adjudication Facility (paragraph 8-102) and if a permanent reassignment is about to take place, then due process procedures (paragraph 8-201) would have to be applied.

In an effort to enhance understanding of the current policy on this issue, this paper shall clarify the provisions and intent of applicable regulatory requirements, explore the underlying purpose and philosophy behind having suspension and due process procedures in DoD Personnel Security Policy, and provide an insight to

component and field level perceptions on how current implementation is being done. As a result, there should be a clearer understanding on the necessity of suspension and due process procedures when a personnel security determination is being considered.

BACKGROUND

Recent concern on this issue was raised by a member of a military service assigned to a DoD organization. As the result of a criminal investigation, some derogatory information was made available to the member's commander. Upon receipt of this information, the commander initially suspended the member's access to classified information and temporarily assigned him to a position not requiring access to classified information. A month later, the commander requested the member be reassigned out of the organization and back to the military service, to a position having less sensitive duties. The first action was within the provisions of DoD 5200.2-R, paragraph 8-102, and should have remained in effect until the Central Adjudication Facility made a final determination. The second action, the reassignment, should have taken place after the Central Adjudication Facility made a final determination to revoke security clearance eligibility and would have required the invocation of due process procedures directed under paragraph 8-201.

CURRENT POLICY

The current policy for the DoD Personnel Security Program falls under the provisions of DoD 5200.2-R. At the onset of this regulation, in paragraph 1-201b, it clearly states that *"All provisions of this regulation apply to DoD civilian personnnel, **members of the armed forces** and..."*

Referring to Chapter VIII, Section 2, of the same regulation, the following outline expands upon and clarifies the procedures that should be taken when derogatory information is brought to a commander's attention.

1. The member's access to classified information is suspended (paragraph. 8-102).
   - The commander weighs available facts and makes a determination within the best interests of national security.
2. Retain the person in a position with nonsensitive duties within the organization until there has been a resolution on the veracity of the derogatory information/allegations (Paragraphs 8-102 and 8-200)
3. Expeditiously resolve any questions as to a person's continued eligibility for access to classified information so that a final determination can be made (Paragraph 8-102) (Usually done by Central Adjudication Facility).
4. Comply with due process provisions of paragraph 8-201 if an unfavorable administrative action is ultimately deemed appropriate.

Unfavorable Administrative Action - Since due process takes effect when an unfavorable administrative action occurs, it is necessary this be defined. Referring to paragraph 1-329, an unfavorable administrative action is an adverse action taken

as the result of a (unfavorable) personnel security determination. The Following actions may be considered such a determination:

- denial or revocation of clearance/access to classified information
- denial or revocation of clearance/access to special access authorization
- non-appointment or non-selection for appointment to sensitive position
- reassignment to a position of lesser or non sensitive duties
- non-acceptance for or discharge from the armed services

Therefore, due process procedures of paragraph 8-201 must be afforded an individual before any of the above occur.

Suspension vs Reassignment - To enhance understanding of current policy, the distinction between suspension in access and reassignment to a position with less or non sensitive duties should be drawn. The importance of this was alluded to in the background section of this paper.

Suspension - A suspension in access to classified information, or *temporary* assignment to a position with less sensitive duties, is an interim action taken by a commander when initial derogatory information exists which raises serious questions as to an individual's ability and intent to protect classified information. This suspension is in effect until a final determination, by the Central Adjudication Facility, is made on one's clearance eligibility. (paragraph 8-102). The following items describe a person's status when this occurs:

- there is no access to classified information
- no *final* determination has been made to terminate a person's security clearance or access to classified information
- position sensitivity has not been permanently changed or removed
- change in occupational specification or rating has not been initiated

Reassignment - Alternatively, a reassignment is considered an unfavorable administrative action as defined above. A reassignment usually occurs when there has been a permanent revocation of a security clearance and/or a permanent removal from a position with sensitive duties. Before any of these actions occur, the full range of due process procedures contained within paragraph 8-201, must be afforded.

It should be clear that a suspension and a reassignment are two separate actions with very different results. The former relates to the time period before a decision has been made, whereas the later takes place after a decision has been made on one's ability to protect classified information. Both are done in the interests of national security and do consider individual rights.

Central Adjudication Facility - Current policy, in an effort aimed at fairness and uniform application of regulatory requirements, directs that each DoD component establish a Central Adjudication Facility to act on all personnel security determinations. This facility not only makes determinations for the granting of initial security clearance eligibility, but also for those cases where derogatory information raises questions as to *continued* eligibility.

An understanding of the Central Adjudicative Facility concept is essential to the focus of this paper. The Central Adjudication Facility concept was created to assure that determinations on security clearances were done in a fair manner without resort to capriciousness, revenge. or self serving purposes. Another purpose was to promote uniformity. Before these facilities existed, a person could be eligible for security clearance eligibility at one command while being ineligible at another, both decisions being based on virtually the same information. Regardless of any misunderstanding of the regulation, current policy implies that military members must have their security clearance eligibility determined by a Central Adjudication Facility just as civilians do. When this is abided by, a person's loss of clearance eligibility or eventual reassignment is determined by the Central Adjuducation Facility based on all available information and not on the potential scenario where it is done by a someone for personal reasons. In essence, the ultimate goal is to achieve fairness.

Personnel Security Determination vs Suitability Determination - Another item that should be mentioned in this discussion of policy, is that a personnel security determination and a suitability determination are two different things. In this case we are discussing a personnel security determination where the interest is in one's eligibility for access to classified information. The other, a suitability determination, is related to the hiring or retention of persons for employment. They have two distinct meanings and it should be reiterated that we are concerned with personnel security related matters, not hiring and retention matters.

WHY DUE PROCESS?

It is of the utmost importance to protect our national security and the integrity of classified information. A security clearance is one means of helping assure this. A security clearance is granted based on assessments of individual trustworthiness and may be revoked when it is determined that the trustworthiness of an individual lessens to an unacceptable degree. There are guidelines for this determination contained within DoD 5200.2-R. But while a government agency is making a determination to revoke a clearance, it is essential that individual rights be balanced against those of the government in protecting national security.

Individual Rights - In considering individual rights, it must be realized that there is no absolute right to employment in a particular position with sensitive duties. But this does not negate the need for due process procedures. These procedures are necessary to assure that the government's decision to revoke a clearance is based on a rational connection between the behavior which may cause an adverse action and the threat, or risk, it poses to national security (Gayer vs Schlesinger, 490 F2d 741 (1973) and Smith vs Schlesinger 513 F2d 462 (1975)). Furthermore, the government must demonstrate that its actions affecting private interests are done without resort to arbitrary and discriminatory procedures and have some basis within regulatory and established procedures. (Greene vs Mc Elroy 360 US 474 (1959)).

Expanding upon the due process/individual rights concept, aside from assuring that the government's actions are warranted, is the matter of harm that may occur to the career professional who is denied a higher clearance or suffers a clearance

revocation. The potential harm may occur whether or not the derogatory information is founded, may be quite tangible, and may have an adverse impact on one's current or future employment opportunities (Plesser, 1987: p. 18).

Many persons are in positions requiring extensive education and specialized training. More often than not, these positions require some type of security clearance. The revocation of a security clearance may close many present and future opportunities for a member to contribute knowledge and skills. This may be further compounded by the fact that many specialized positions have to few openings available. Conversely, the government is also losing out on the time and money invested in this member if he cannot contribute. Don't these aspect in themselves lend some credence to the necessity of due process procedures?

Another tangible prospect of harm, if there is no due process, is the possibility that another potential employer, or unit, would not second guess another agency's denial or revocation of a person's security clearance. In essence, the action based on the derogatory information, if not proved differently, may become a badge of dishonor that may prejudice, if not significantly foreclose a class or range of opportunities (Plesser, 1987: p. IV). Due process procedures provide one avenue for alleviating the potential harm, especially when the derogatory information is unfounded.

WHAT IS DUE PROCESS?

When mention is made of due process protections, there is usually an impression of paranoia and the thought of a long drawn out procedure requiring an application of the judicial model. Due process is not a fixed and rigid court like process, but in this instance, it is a flexible process dependent upon the context and circumstances of a given situation. A full evidentiary hearing is not always required. In reference to the issue at hand - action taken when derogatory information is found - there is no excessive due process involved. Relying on language found in Department of Navy vs Egan (U. S. Supreme Court Slip Opinion, February 1988, p. 14), the court felt sufficient due process was given when the person received notice of reasons for the proposed denial (or revocation), an opportunity to inspect all relevant evidence, a right to respond, a written decision, and an opportunity to appeal. These procedures allow the person to know why the action is being taken and have an opportunity to refute or comply.

Current Regulatory Due Process - To put due process within perspective, the following outline describes the minimum requirements set forth in the DoD Personnel Security Program (DoD 5200.2-R), under paragraph 8-201, Unfavorable Administrative Action Procedures, when a clearance revocation or reassignment occurs.

Before any Unfavorable Administrative Action Procedure takes place, the following must be afforded an individual:

1. Written statement of reasons why an unfavorable administrative action is being taken.
2. An opportunity to reply in writing to such authority as the head of the component may designate.
3. A written response to any reply submitted stating the final reasons therefore, specific as possible.
4. An opportunity to appeal to higher level of authority designated.

These required actions are not excessive nor complex, and comply quite well with the procedures mentioned in the Egan case. These procedures assist in assuring that no final actions are taken without due process.

Military Member Due Process - The argument has been raised that due to the dearth of case law in relation to military members, due process for them is not necessarily a legal requirement - that it is "the commander's prerogative" to make the decision. While there appear to be not court cases specifically addressing military member due process, this does not mean that military members should be neglected until a legal precedent occurs. This problem should be addressed now because military members are currently being affected by decisions which do not fully recognize, or apply, current regulatory requirements. What is essentially being sought is fair treatment of the military member from the time the derogatory information is brought to light until a final decision on security clearance eligibility is made by the Central Adjudication Facility.

There needs to be a reassurance that the procedures outlined here are applied to military members before any adverse action occurs. If they are not followed, we may eventually have to contend with remedial Court and Congressional action requiring more complex procedures which may genuinely abrogate the authority

commanders presently have. While it is not suggested that the commanders' authority be abrogated, or the mission be compromised, it is suggested that any action affecting a military member's security clearance, and job position, be based on all available information and a reasonable basis for doubting a member's ability to protect classified information.

The potential impact upon a military member's career is significant when any derogatory information is brought to light. The impact may be magnified when the information is brought forth or used in a capricious manner. The member's career, reputation, and possibly command may be greatly impacted as may be the respect and morale of his cohorts and those commanded, if the opportunity to disprove unfounded derogatory information/allegations is not made available. Many have argued that as long as nothing negative is reflected on one's record, (i.e. when the derogatory information was adjudicated favorably ***after*** the person was permanently reassigned or cross-trained) the actions of the commander should be sufficient. This argument neglects the intangible harms that may occur (i.e. word-of-mouth labeling as a risk, being called a "criminal," etc.) during the adjudication process and reassignment to another position. These due process procedures are essential to help preserve the integrity of the personnel security program and assure fairness. If due process is neglected, more than just the accused may be losers.

CONCLUSION

A review of practitioners in the field gave the impression that here seems to be some confusion as to when due process must be applied to military members in

jeopardy of losing their security clearance. When queried about due process for civilians, people in the field found it rather clear cut due to the myriad of legal and regulatory requirements. But when queried about its applicability to military personnel, a defensive attitude was taken and the answers varied. Several people left the impression it was a grey area left to the discretion of the commander due to no cohesive background in law or regulation. Few seemed clear on the idea that due process procedures should be invoked when a military member's permanent reassignment to a position with less sensitive duties was imminent prior to a final decision, on security clearance eligibility, by a Central Adjudication Facility. After reviewing this paper it should be clear that these due process procedures are necessary and are applicable to military members.

Due process is necessary whenever an adverse action, or (unfavorable) personnel security determination is made. A suspension in access to classified information is not an adverse action in itself. But, a security clearance revocation, or reassignment to a position with less sensitive duties, done before a final adjudicative decision is made, may be considered adverse actions. The philosophy behind due process is aimed at minimizing the harm to an individual (whether it be tangible or intangible) while allowing the member an opportunity to challenge the accusations, especially if they are unfounded. Due process also allows the member to not have the status of his present position be further impinged (aside from the removal of access) until there is a final decision.

In advocating due process, the concern is with protecting the interests of individuals affected by providing established fair procedures and measures while

protecting our national security and classified information. Individual rights are an integral aspect of our country's system of government as security programs are an integral part of protecting our national security. If both of these can be balanced in an arena of mutual respect, we will all benefit. For military members, this balancing act will help contribute to their support of the higher standard that is expected of them in protecting our nation while knowing that they are equally protected by our nation's concept of due process and individual rights.

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